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# RECONCILING MARITIME LIENS AND THE LIMITATION OF LIABILITY ACT

DAVID GRAY CARLSON\*

## INTRODUCTION

Few matters are assigned exclusively to the jurisdiction of the admiralty courts. Claimants with common law remedies have the option to leave admiralty court and pursue their remedies in state court or, if the proper jurisdictional requirements can be met, in federal court.<sup>1</sup> But two areas that are undeniably the exclusive province of the admiralty judge are in rem foreclosure upon maritime liens<sup>2</sup> and petitions by vessel owners under the Limitation of Liability Act.<sup>3</sup>

The two procedures have certain features in common. Each system generates a fund which may be established, in part, by judicial sale of the vessel.<sup>4</sup> Each system provides an option whereby the vessel owner may avoid loss of the vessel by substituting adequate security.<sup>5</sup> Under each system, claimants are expected to litigate for the fund, with adverse consequences if they choose not to do so.<sup>6</sup>

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<sup>1</sup> 28 U.S.C. § 1331 (1976); *see also infra* note 146. The current "saving for suitors" language in § 1331(1) does not mention "common law remedies" as did the original clause. *See* 1 Stat. 77 (1789); D. ROBERTSON, *ADMIRALTY AND FEDERALISM* 18 (1970). The new clause has been thought to intend no change in the law, however. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 1-13, at 39 (2d ed. 1975).

Admiralty actions are not "federal questions," so that diversity jurisdiction is required if a maritime plaintiff wishes to sue outside admiralty but in federal court. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359-80 (1959). Of course, if a federal statute is the source of the right, federal question jurisdiction exists. *Id.* at 359 (Jones Act).

<sup>2</sup> *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427-31 (1866); *see also* *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213, 215 (1867) ("The lien and the proceeding in rem are, therefore, correlative—where one exists, the other can be taken, and not otherwise."); *Interocean Shipping Co. v. M/V Lygaria*, 512 F. Supp. 960, 963 (D. Md. 1981) ("It has long been settled that a libel *in rem* is maintainable only in connection with a maritime lien.").

<sup>3</sup> 46 U.S.C. §§ 181-189 (1976) ("Limitation Act"); *see* *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 123-24 (1871). Petitions of limitation of liability are governed by the Supplemental Rules for Certain Admiralty and Maritime Claims, FED. R. CIV. P. SUPP. F, which refers to petitions as "complaints."

<sup>4</sup> Compare FED. R. CIV. P. SUPP. E(9) (providing for the disposition of property by sale) with *id.* F(1) (providing for the transfer to court-appointed trustee of interest in the vessel).

<sup>5</sup> Compare FED. R. CIV. P. SUPP. E(5)(a) and 28 U.S.C. § 2464 (1976) (release of vessel for double security) with *id.* F(1) (deposit of sum at least equal to amount of value of interest in vessel and freight or approved security therefor).

<sup>6</sup> Under in rem practice, lienholders must intervene before the fund is distributed. By this time, the vessel will have been sold in an in rem sale, which destroys all outstanding liens. The

In spite of these common features, the *in rem* and limitation procedures have diametrically opposed purposes. The *in rem* procedure is the creditor's delight. Creditors are automatically granted liens on the "guilty" vessel for various tort and contract claims.<sup>7</sup> If they have a maritime lien, they may cause the arrest and sale of the encumbered vessel. The proceeds of the sale are then divided among the lien claimants according to a complex judge-made system of priorities.<sup>8</sup> The Limitation of Liability Act, on the other hand, is the bane of creditors and a major commercial advantage for vessel owners. In a limitation proceeding, the vessel owner can petition the admiralty court to limit his liability for claims arising from a voyage to the value of the vessel in question, plus earned freight.<sup>9</sup> The vessel owner is required to create a fund, either by surrendering the vessel and earned freight to a court-appointed trustee, by paying in an equivalent sum, or by posting security for this amount.<sup>10</sup> Once having established an adequate fund, the vessel owner is entitled to an injunction which bars all those whose claims arose during the voyage for which limitation of liability is sought from litigating in other courts,<sup>11</sup> whether the

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Trenton, 4 F. 657, 659-60 (E.D. Mich. 1880). And once the fund has been distributed, lienholders have no further rights on their liens. *American Bank of Wage Claims v. Registry of the Dist. Court of Guam*, 431 F.2d 1215, 1218-19 (9th Cir. 1970). Of course, their *in personam* rights against the vessel owner, if any, survive. G. GILMORE & C. BLACK, *supra* note 1, § 9-90, at 801-02.

In petitions for limitation of liability, the claimants are required to cease litigation and continue further proceedings only in the limitation proceeding. FED. R. CIV. P. SUPP. F(3), (4). Those claimants who fail to make a claim lose all right to pursue the vessel owner, who is completely exonerated from further liability. 46 U.S.C. § 185 (1976).

<sup>7</sup> G. GILMORE & C. BLACK, *supra* note 1, §§ 9-1 to 9-2, at 587-89. The lien is not against all vessels owned by the maritime debtor, but against the vessel involved in the claim. Where the debtor owns Vessel A and Vessel B and takes supplies aboard Vessel A, the supplier has no maritime lien against Vessel B. Cf. *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844) (vessel that commits an act of aggression is treated as the offender notwithstanding and apart from the personal misconduct or responsibility of the owner); *United States v. The Little Charles*, 26 Fed. Cas. 979, 982 (C.C.D. Va. 1818) (same); *Todd Shipyards Corp. v. City of Athens*, 83 F. Supp. 67, 74-75 (D. Md.), *aff'd sub nom. Acker v. City of Athens*, 177 F.2d 961 (4th Cir. 1949) (per curiam) (same).

<sup>8</sup> See *infra* text accompanying notes 53-54.

<sup>9</sup> 46 U.S.C. §§ 183(a), 184 (1976). Under § 184, a creditor may also petition to limit the liability of the vessel owner, but, as can well be imagined, there is no recorded case of a creditor so petitioning. It is theoretically possible, however, that a low-priority lienholder might recover more in a limitation proceeding than out of it. For example, where the vessel is the only asset, the creditor, in a limitation proceeding, would receive some small amount on a pro rata basis but would receive nothing under a distribution of an *in rem* fund.

<sup>10</sup> 46 U.S.C. § 185 (1976); FED. R. CIV. P. SUPP. F(1). Obviously, whenever a bond can be posted, a vessel owner may also pay in the full limitation amount. In general, when reference is made to posting a bond, whatever is said will apply as well to payment of the full sum into the court registry.

<sup>11</sup> 46 U.S.C. § 185 (1976); FED. R. CIV. P. SUPP. F(3).

claims be in rem against the vessel<sup>12</sup> or in personam against the vessel owner. The resulting "concourse"—or *concursum* as it is picturesquely called<sup>13</sup>—requires each claimant to litigate only in the limitation proceeding.<sup>14</sup> After claims are adjudicated, the claimants share proportionately in the limitation fund,<sup>15</sup> even though the claimants may have liens which, under maritime law, are accorded strict priorities over one another.<sup>16</sup>

There is tremendous risk of confusion and disarray when the two distribution systems collide. The vessel owners may limit liability for claims that arise during a single voyage, and therefore only a portion of the maritime liens outstanding may be forced to litigate in the *concursum*. These "limitation" liens have no priorities inter se. Other lienholders not subject to limitation (the "nonlimitation" liens) are free to pursue the vessel, if they can. When the vessel owner chooses to surrender his vessel in a limitation proceeding, the nonlimitation lienholders are compelled to follow the vessel into the limitation proceeding if they are to foreclose on their liens. Once there, the priorities between the limitation liens and the nonlimitation liens are directly at issue. Priority between these liens remains a complete mystery.

These problems have not yet been worked out in litigation, so that navigation of these two maritime relics through the narrow channels in which they travel is treacherous in the extreme. It is my purpose in this Article to suggest some "rules of navigation" in the hope that collision can be avoided, or at least that, when it occurs, there will be a minimum of wreckage.

### I. THE LIMITATION OF LIABILITY ACT

The Limitation Act was passed in 1851<sup>17</sup> as part of a general movement in the nineteenth century to protect the vessel owner from

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<sup>12</sup> *In re Moore*, 278 F. Supp. 260, 265-66 (E.D. Mich. 1968) (letter of undertaking, promising that ship insurer would not appear in any lawsuit arising from claim in consideration for claimant's refraining from attaching ship, does not allow claimant to press claim independent from owner's limitation of liability proceedings); *cf.* The "Benefactor" S.S. Co. v. Mount, 103 U.S. 239, 245-46, 249 (1880) (in rem proceedings against steamship stayed until determination of the proceedings on the petition for limited liability).

<sup>13</sup> *See, e.g.*, Maryland Casualty Co. v. Cushing, 347 U.S. 409, 415, 417 (1954); Black Diamond S.S. Corp. v. Robert Stewart & Sons, 336 U.S. 386, 392-94, 401-02 (1949); *In re Helena Marine Serv., Inc. v. Sioux City*, 564 F.2d 15, 18, 19 (8th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

<sup>14</sup> FED. R. CIV. P. SUPP. F(4).

<sup>15</sup> *See infra* text accompanying notes 55-58.

<sup>16</sup> *See infra* text accompanying notes 53-54.

<sup>17</sup> 9 Stat. 635 (1851).

liability where he was not personally at fault.<sup>18</sup> Under the Limitation Act, a vessel owner<sup>19</sup> with no personal fault<sup>20</sup> can limit his liability to the value of his ownership interest in the vessel plus freight earned during the limitation voyage.<sup>21</sup> Beyond that amount, the Act exonerates the vessel owner from further liability. Thus, the Limitation Act protects the vessel owner from liability solely by respondeat superior.<sup>22</sup>

The so-called Loss of Life amendments to the Act,<sup>23</sup> passed in 1936 after a major sea disaster,<sup>24</sup> have provided a minor exception to this pattern. Where the vessel is a seagoing ship,<sup>25</sup> the vessel owner

<sup>18</sup> See G. GILMORE & C. BLACK, *supra* note 1, §§ 10-1 to 10-2, at 818-19; Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 TUL. L. REV. 999, 1011-13 (1979).

<sup>19</sup> The Limitation Act protects not only vessel owners, but also charterers who "man, victual and navigate such vessel . . ." 46 U.S.C. § 186 (1976). For the purpose of this Article, I shall refer only to vessel owners, although everything said about them usually applies to "bareboat charterers" as well.

<sup>20</sup> 46 U.S.C. § 183(a) (1976) (vessel owner must have no "privity or knowledge"). Privity or knowledge is equated with the owner's negligence, as distinguished from the crew's negligence. See G. GILMORE & C. BLACK, *supra* note 1, §§ 10-20 to 10-23, at 877-82 ("[P]rivacy or knowledge must be that of the owner himself."). When the vessel owner is a corporation, the managing agents take the place of the vessel owner in assessing whether privity and knowledge are absent. See *Spencer Kellogg & Sons v. Hicks*, 285 U.S. 502, 511 (1932). The vessel owner may not limit liability on "personal contracts." *Signal Oil & Gas Co. v. The Barge W-701*, 654 F.2d 1164, 1168 (5th Cir. 1981). Courts have decided that charter parties contracts are personal, but that bills of lading (and hence all cargo claims) are not. *Id.* at 1168-69. The law on personal contracts seems to have little to do with whether the vessel owner personally makes the contract. Rather, the standard is whether the contract is of a type that the courts have declared is ordinarily made personally by a vessel owner. See Castles, *The Personal Contract Doctrine: An Anomaly in American Maritime Law*, 62 YALE L.J. 1030 (1953); Crowe, *Kinds of Losses Subject to Limitation: The "Personal Contract" Doctrine*, 53 TUL. L. REV. 1087 (1979).

<sup>21</sup> 46 U.S.C. § 183 (1976). Of course, the vessel owner will be insured, so that he will recover much of the value of the vessel from his insurer. The vessel owner is therefore likely to lose very little from a maritime disaster. See *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 418-22 (1954).

<sup>22</sup> *South Carolina State Highway Dep't v. Jacksonville Shipyards, Inc.*, 1976 A.M.C. 456 (S.D. Ga. 1975).

<sup>23</sup> 46 U.S.C. § 183(b) (1976).

<sup>24</sup> See *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 414 n.4 (1954). The disaster was the sinking of the *Morro Castle*, a passenger vessel arriving in New York from the Caribbean. As a result of the accident, 135 lives were lost. The vessel owner established \$20,000 as the limitation fund, against claims of \$13,500,000, but it received \$2,100,000 in reimbursement from the hull insurers. The case was settled, however, for \$890,000. Duncan, *Limitation of Shipowners' Liability: Parties Entitled to Limit; the Vessel; the Fund*, 53 TUL. L. REV. 1046, 1076 (1979); see also Donovan, *supra* note 18, at 1031-33 (discussing the origins of the Loss of Life amendments).

<sup>25</sup> 46 U.S.C. § 183(b) (1976). Elsewhere, the statute says that, as used in § 183(b):

[T]he term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters or

may not limit liability against personal injury and wrongful death claimants if the master of the vessel has "privity or knowledge" at the commencement of the voyage.<sup>26</sup> Even where the master's fault prevents limitation against personal injury claims, limitation of liability is still available against cargo claimants, provided the vessel owner is not otherwise at fault.<sup>27</sup>

The Limitation Act permits a limitation of the vessel owner's personal liability for claims arising from a specific voyage<sup>28</sup> or its equivalent.<sup>29</sup> The amount for which he is liable is the value of the vessel, as determined after the voyage,<sup>30</sup> and freight earned during the voyage.<sup>31</sup> The Limitation Act requires that a fund be set up to satisfy all "limitation claims." When the vessel owner has set up the fund he is exonerated from any other liability.<sup>32</sup>

When the narrowly drawn Loss of Life amendments apply to the voyage—i.e., voyage by a seagoing vessel—additional liability is imposed. In such cases, the vessel owner must supplement the limitation fund with a "personal injury" fund whenever the amount of the limitation fund going to the personal injury and wrongful death

nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title . . . .

46 U.S.C. § 183(f) (1976). The language certainly sounds as if pleasure yachts, tugs, etc., are immune from having to contribute to the personal injury fund, but courts have managed to conclude that *all* seagoing vessels, etc., must contribute. See G. GILMORE & C. BLACK, *supra* note 1, § 10-35, at 922 n.139a; Donovan, *supra* note 18, at 1078-82.

<sup>26</sup> 46 U.S.C. § 183(e) (1976).

<sup>27</sup> *Id.*; see Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583, 586-87 (2d Cir. 1961), *cert. denied*, 368 U.S. 989 (1962).

<sup>28</sup> The "single voyage" rule has been established by case law. See *The City of Norwich*, 118 U.S. 468, 491 (1886). For the Loss of Life amendments, a slightly different rule applies. Under 46 U.S.C. § 183(d) (1976), a new fund must be set up for every "distinct occasion" on a voyage in which injury occurs. See Donovan, *supra* note 18, at 1082-84. Under straight limitation, only one fund for the entire voyage need be set up. See generally *The City of Norwich*, 118 U.S. 468, 492-93 (1886) (liability established by value of interest of owner in vessel and freight when voyage ends).

<sup>29</sup> The Limitation Act does not require that a "voyage" occur. *In re Moore*, 278 F. Supp. 260, 262 (E.D. Mich. 1968); G. GILMORE & C. BLACK, *supra* note 1, § 10-47, at 948-49. Where no voyage has occurred, the outward boundaries of the limitation period are based upon the "incident" which gives rise to claims. See *Lehigh Valley R. R. v. Jones*, 50 F.2d 828, 830 (3d Cir. 1931); G. GILMORE & C. BLACK, *supra* note 1, § 10-47, at 948-49; Crowe, *supra* note 20, at 1131.

<sup>30</sup> *In re Zebroid Trawling Corp.*, 428 F.2d 226, 228 (1st Cir. 1970); *The City of Norwich*, 118 U.S. 468, 492 (1886). A strange corollary to the obligation to contribute the value of the vessel is the further obligation to contribute the recovery made against the other vessel in a collision case. See Harmon, *Discharge and Waiver of Maritime Liens*, 47 TUL. L. REV. 786, 799-800 (1973).

<sup>31</sup> *The Main v. Williams*, 152 U.S. 122 (1894).

<sup>32</sup> 46 U.S.C. § 185 (1976).

claimants is less than \$60 times the vessel's registered tonnage.<sup>33</sup> This fund is set aside exclusively for the personal injury and wrongful death claimants.<sup>34</sup>

Under section 185 of the Act, the vessel owner may establish the basic limitation fund, at his option, by one of three methods. He may tender the vessel, together with earned freight and any other sums of money which may be required, or he may keep the vessel and post an

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<sup>33</sup> *Id.* § 183(b). The calculation of the personal injury fund is quite complex. First, the court must determine the pro rata share of the basic limitation fund which, absent the personal injury fund, would go to the personal injury and wrongful death claimants. *Id.* ("If . . . the portion of [the limitation fund] applicable to the payment of losses in respect of loss of life or bodily injury is less than \$60 per ton of such vessel's tonnage . . ."); see *Oliver J. Olson & Co. v. American S.S. Marine Leopard*, 356 F.2d 728 (9th Cir. 1966) (no personal injury fund unless the § 183(c) fund is insufficient); Purdy, *The Recent Amendment to the Maritime Limitation of Liability Statutes*, 5 BROOKLYN L. REV. 42, 51-53 (1935). Naturally, this calculation requires that the claims first be litigated to the admiralty court. See *In re Luckenbach S.S. Co.*, 1953 A.M.C. 808 (S.D.N.Y. 1953); G. GILMORE & C. BLACK, *supra* note 1, § 10-34, at 92. But see *In re Panoceanic Tankers Corp.*, 332 F. Supp. 313, 314-15 (S.D.N.Y. 1971) (bond required since portion going to personal injury plaintiffs was clearly inadequate).

Once the proportion of the fund going to these claimants is determined, the court then subtracts the amount from the product of the vessel's registered tonnage and \$60. The result, if a positive number, is the amount which the vessel owner must pay in order to complete the personal injury fund. 46 U.S.C. § 183(b) (1976) ("[S]uch portion shall be increased to an amount equal to \$60 per ton . . ."). Formulaically, the calculation is expressed as follows:

$$\left( \frac{\text{Registered Tonnage}}{\text{Total Claims}} \times \$60 \right) - \left( \frac{\text{Injury Claims}}{\text{Total Claims}} \times \text{Limitation Fund} \right) = \text{Contribution to Personal Injury Fund}$$

Under this formula, where there is *any* money in the limitation fund, the vessel owner will be compelled to contribute something less than \$60 per registered ton into the personal injury fund. Property claimants therefore do not gain a larger share of the basic limitation fund when the personal injury fund is established, since the same proportion of the limitation fund which would otherwise go to the personal injury claimants constitutes part of the personal injury fund. *Olson*, 356 F.2d at 737 n.5.

<sup>34</sup> 46 U.S.C. § 183(b) (1976). The personal injury fund is not the only situation where different limitation claimants have different rights to different funds. Another curio of limitation law is the so-called flotilla doctrine, introduced by Justice Holmes in *Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn E. Dist. Terminal*, 251 U.S. 48 (1919). In that case, the Supreme Court held, in a collision incident, that the limitation fund for a tug towing barges owned by the same party should be the value of the tug, not the flotilla. See *In re Oswego Barge Corp.*, 439 F. Supp. 312, 323-24 (N.D.N.Y., 1977) (flotilla doctrine still good law), *aff'd in part, rev'd in part*, 664 F.2d 327 (2d Cir. 1981). The flotilla doctrine was not generally favored by later courts, see G. GILMORE & C. BLACK, *supra* note 1, § 10-32, at 918 ("a great judge's momentary aberration"), and was limited solely to collision cases. Thus, where a contractual claim can be made out, the limitation fund must represent the entire flotilla. *E.g.*, *Standard Dredging Co. v. Kristiansen*, 67 F.2d 548, 551 (2d Cir. 1933) (seaman's personal injury suit based on contractual relation with employer); *Agrico Chem. Co. v. S.S. Atlantic Forest*, 459 F. Supp. 638, 651-55 (E.D. La. 1978) (suit by cargo owner for damage to property), *aff'd*, 620 F.2d 487 (5th Cir. 1980). Where collision claims and other claims are present in the same limitation proceeding for a flotilla, the court will have to set up different funds and allocate them to the different claimants separately. See *Donovan*, *supra* note 18, at 1072-73.



equivalent bond or pay an equivalent sum of money into the court registry. In case he chooses to surrender the vessel, the court must appoint a trustee to sell the vessel and to apply the proceeds toward the limitation fund.<sup>35</sup>

A vessel owner's option of surrendering the vessel can be complicated by factual circumstances in which the vessel owner does not control the vessel. Most typically, a vessel owner may be only a minority owner without the power to surrender the vessel over the opposition of the other owners, who may prefer to retain the vessel and post a bond. It may also commonly be the case that the vessel is chartered to another by the time the limitation proceeding commences. Under these circumstances, the vessel owner may have no ability to proceed by surrender of the vessel. Nevertheless, he is entitled to limit his liability if he pays the amount or posts security on the amount which represents his interest in the vessel.<sup>36</sup>

One important situation in which the vessel owner's power to surrender the vessel is lost is when the vessel has been arrested in rem on the libel of a claimant against whom a vessel owner may not limit liability. Such a lienholder is not precluded from proceeding against the vessel in an in rem proceeding if the arrest can be made before the vessel is surrendered to the limitation trustee. As will become apparent later, claimants with liens arising before the commencement of the limitation voyage (the "antecedent liens") may proceed against the vessel without interference from the Limitation Act.

In *F/V Zebroid*,<sup>37</sup> a preferred ship mortgagee (an antecedent lienholder) brought an in rem proceeding against the Zebroid to foreclose on the mortgage. The vessel was sold for \$45,000, and the funds were entered into the court's registry. At this point, the widow of the Zebroid's captain (who had been lost at sea) intervened, claiming a tort lien superior to that accorded to the ship mortgagee. Her claim for damages so far exceeded the value of the vessel that the owner filed a petition for limitation of liability in a separate action. To establish the limitation fund, the vessel owner asked that it be allowed to "surrender the vessel" by contributing the fund created in the in rem proceeding commenced by the mortgagee.

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<sup>35</sup> 46 U.S.C. § 185 (1976). Of course, where the vessel is destroyed and no freight exists, the vessel owner has no liability, in which case there is no need to surrender anything, nor any reason to post a bond. See *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 420 (plurality opinion), 433 (Black, J., dissenting) (1954); *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 127 (1871); *In re Boat Camden, Inc.*, 569 F.2d 1072 (1st Cir. 1978).

<sup>36</sup> See *The City of Norwich*, 118 U.S. 468, 505-06 (1886).

<sup>37</sup> 1970 A.M.C. 113 (D. Mass. 1969), *aff'd sub nom. In re Zebroid Trawling Corp.*, 428 F.2d 226 (1st Cir. 1970).



The district court initially granted the vessel owner's request on an ex parte motion, at which point the fund in the in rem proceeding was ordered transferred to the limitation proceeding. Without a res upon which to foreclose, the mortgagee was forced to intervene in the new limitation proceeding, wherein it requested a reversal of this transfer. The district court repented and revoked its transfer of the in rem fund over to the limitation proceeding.

The court of appeals agreed that the fund created by the in rem proceeding could not be wrested from the mortgagee. The mortgage lien, reasoned the court, arose prior to the limitation voyage. The mortgagee therefore was not subject to the Limitation Act and could not be forced into the limitation proceeding, where it would have to compete with other claimants for the limitation fund.<sup>38</sup>

That the fund, created by the judicial sale of a vessel in an in rem proceeding, cannot be taken away from an antecedent lienholder and given to the limitation claimants is undoubtedly correct. The ratio decidendi here was that the antecedent lienholder whose claim accrued prior to the limitation voyage could not be made subject to the Limitation Act. If the lienholder *was* subject to the Act, the claimant would have been compelled by the court's injunction to drop the in rem action and pursue his rights only in the limitation proceeding.<sup>39</sup> In such a case, the vessel owner, in lieu of surrendering the vessel, may contribute the fund created by the in rem sale.<sup>40</sup> Thus, *Zebroid* stands merely for the proposition that if the vessel has been arrested pursuant to a lien not subject to the Act (e.g., an antecedent lien), the fund created by an in rem sale in that action may not be used to

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<sup>38</sup> "[O]bligations which accrued prior to the voyage, not being subject to limitation, remain unaffected by the proceeding. Since vis-a-vis the owner they do not stand to be reduced, it must follow that he cannot throw the security interests of those lienors into the pot." 428 F.2d at 229.

<sup>39</sup> *Id.* at 228 ("The right to limit claims . . . applies only to the claims arising during the one voyage . . . . This includes all liens attaching during the voyage . . . ."); see also *Just v. Chambers*, 312 U.S. 383, 386 (1941).

<sup>40</sup> *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 124-25 (1871); *The Mendota*, 14 F. 358 (S.D.N.Y. 1882) (transfer from state quasi in rem attachment); *Fed. R. Civ. P. Supp. F(9)* ("If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules."). The district court in *Zebroid*, 1970 A.M.C. at 115, held that this language applied only to venue, since it appears in the venue subsection of Rule F. If it applied only to venue, presumably the words would not have referred to "these rules" but to "this subsection" or "for the purposes of venue."

One author assumes that, whereas the in rem fund can be used for surrender purposes by the vessel owner, the fund may not be transferred. Rather, the limitation proceeding must be transferred where the fund is. Staring, *Limitation Practice and Procedure*, 53 TUL. L. REV. 1134, 1142-43 (1979). Such a view seems unnecessarily restrictive of the court's choice of the most convenient forum. If all the libellants in the in rem proceeding must halt their litigation, there is no compelling reason why the in rem fund cannot be transferred. See *Continental Grain Co. v. The FBL-585*, 364 U.S. 19 (1960) (in rem action transferred under 28 U.S.C. § 1404(a) (1976)).

establish the limitation fund (thereby denying the antecedent lienholder his rights). The vessel owner under these circumstances has lost his option to surrender the vessel. But other than arrest by an exempt lienholder, reduction of the vessel into a fund does not, without more, prevent the vessel owner from surrendering the vessel for purposes of the Limitation Act.

## II. IN REM DISTRIBUTIONS V. DISTRIBUTIONS UNDER THE LIMITATION ACT

Maritime liens are supplied by the general maritime law as formulated by the courts, with the exception of a few narrow types of liens owing their existence to federal statute.<sup>41</sup> In general, most maritime tort and contract claims are secured by maritime liens on the "guilty" vessel.<sup>42</sup> Whether any given type of claim gives rise to a lien has been decided on a case-by-case basis.<sup>43</sup>

One key difference between in rem procedure and limitation procedure, both of which involve distribution of a fund, is that, after the proceedings are over, the maritime lienholder is still free to pursue the vessel owner in personam, if necessary.<sup>44</sup> The limitation claimant, of course, is not.<sup>45</sup> Exoneration of a vessel owner's personal liability is the whole point of a limitation proceeding. In addition, maritime liens run against any accretions to the vessel added after the claim underlying the lien has arisen.<sup>46</sup> Limitation claimants have no analogous advantage. When the limitation voyage ends, the vessel is valued then and there for the purpose of limitation of the vessel

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<sup>41</sup> E.g., Harter Act, 46 U.S.C. § 194 (1976) (lien for criminal fine); Rivers & Harbors Appropriation Act of 1899, 33 U.S.C. § 412 (1976) (lien for damage to navigational aids); 35 C.F.R. § 117.5 (1980) (lien on wrecks in the Panama Canal). Prior to the Federal Maritime Lien Act, 46 U.S.C. §§ 971-975 (1976), the Supreme Court refused to recognize liens arising from supply and repair contracts performed in the vessel's home port or in a port in the same state as the home port. *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875). State law, however, could supply the lien, and the state legislation would be enforced in the federal admiralty courts. *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819). The Federal Maritime Lien Act was passed to establish federal law on "home port" maritime liens. *See Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 271-72 (1940).

<sup>42</sup> *See* G. GILMORE & C. BLACK, *supra* note 1, § 9-20, at 624.

<sup>43</sup> *Id.* at 625.

<sup>44</sup> E.g., *Bollinger & Boyd Serv., Inc. v. Captain Claude Bass*, 576 F.2d 595 (5th Cir. 1978) (ship mortgage deficiency). *See generally* G. GILMORE & C. BLACK, *supra* note 1, § 9-89, at 800-01.

<sup>45</sup> *See* 46 U.S.C. § 185 (1976) (vessel owner exonerated after the limitation fund is established).

<sup>46</sup> *The City of Norwich*, 118 U.S. 468, 503 (1886); *The Joseph Warner*, 32 F. Supp. 532 (D. Mass. 1939).

owner's liability. If the vessel owner adds to the value of the vessel thereafter, the amount of his liability is not increased.<sup>47</sup>

Limitation claimants may take some minuscule amount of comfort from the fact that the limitation fund includes not only the value of the vessel but the earned freight as well,<sup>48</sup> not to mention the personal injury fund which arises in cases of certain oceangoing voyages.<sup>49</sup> Earned freight can be substantial. In the celebrated case of *The Titanic*,<sup>50</sup> fourteen rowboats were the sole surviving parts of the vessel. But earned freight amounted to \$91,000. These additional sums are not ordinarily available to a maritime lienholder when he libels the vessel in rem. While it is said that maritime liens exist on freight, independent jurisdictional grounds must be established. Hence, attachment of freight is problematic at best.<sup>51</sup> Also, owners of vessels that qualify under the Loss of Life amendments must provide substantial funds reserved solely for personal injury claimants.<sup>52</sup> Maritime lienholders have no analogous right in an in rem proceeding.

Maritime liens are subject to a strict order of priority. The order of priority may be roughly summarized as follows: (A) custodial expenses of the admiralty court; (B) seamen's wages; (C) salvage; (D) torts; (E) contracts; and (F) cargo claims.<sup>53</sup> Within each category, the admiralty law imposes its unique rule of "last in time, first in right." The typical in rem action can be analogized to lienholders falling in line, first by category, and second according to the principle

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<sup>47</sup> *The City of Norwich*, 118 U.S. at 502-03; see *infra* note 158.

<sup>48</sup> 46 U.S.C. § 183(a) (1976).

<sup>49</sup> *Id.* § 183(b).

<sup>50</sup> 209 F. 501 (S.D.N.Y. 1913), *rev'd sub nom.* *Oceanic Steam Navigation Co. v. Mellor*, 233 U.S. 718 (1914); *Duncan*, *supra* note 24, at 1046-47.

<sup>51</sup> Maritime liens on freights are frequently said to exist. *E.g.*, *Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp.*, 306 F.2d 188 (9th Cir. 1962). In fact, they seem to be little more than attachments of debts owed to the vessel owner. See *United States v. Freights, Etc., of S.S. Mount Shasta*, 274 U.S. 466, 470 (1927). To state that a maritime lien exists with regard to such debt is to say that when the debt is attached, it will be distributed according to maritime lien priorities. A more interesting proposition is whether the lien on freight survives after the freight is actually paid to the vessel owner. See *Gulf Oil Trading Co. v. Creole Supply*, 596 F.2d 515, 521 (2d Cir. 1979) (issue sidestepped). In any case, freight must be within the court's jurisdiction before the lien can be foreclosed. *Id.* Arrest of the vessel does not establish arrest of the freights, so that reaching the freights is often impossible or unjustifiably expensive.

<sup>52</sup> 46 U.S.C. § 183(b) (1976). In the Yarmouth Castle disaster, the vessel was worth \$32,402, and claims worth \$55,000,000 were filed. The vessel owner stood ready to pay the \$60 per ton amount, but the limitation proceeding was dismissed on choice of law grounds. *In re Chadade S.S. Co.*, 266 F. Supp. 517, 519 (S.D. Fla. 1967). If the personal injury fund had been established, the personal injury claimants would have had an extra \$33,000 to divide between them. See *Donovan*, *supra* note 18, at 1051.

<sup>53</sup> See G. GILMORE & C. BLACK, *supra* note 1, § 9-58, at 734; Varian, *Rank and Priority of Maritime Liens*, 47 TUL. L. REV. 751, 753 (1973).

of "last in time, first in right." Each claimant gets 100% of his claim before the next claimant in line is entitled to a nickel.<sup>54</sup>

Needless to say, the maritime system for dividing the proceeds of an in rem action against a vessel is the farthest concept imaginable from a proportional sharing of the fund. In contrast to the "one-at-a-time" maritime lien system, the Limitation Act requires that limitation claimants share pro rata in the limitation fund.<sup>55</sup> This rule essentially repeals maritime lien status between limitation claimants. Thus, an unsecured claimant such as a Jones Act plaintiff<sup>56</sup> or a nonmaritime plaintiff shares proportionately with a lienholder.<sup>57</sup> And

<sup>54</sup> See *The William Leishear*, 21 F.2d 862, 863 (D. Md. 1927).

<sup>55</sup> Equivocation might have been necessary on this point because of the egregious nature in which our ancestors drafted the Limitation Act. Section 184 of the Act, which governs apportionment of the limitation fund, states:

Whenever any . . . loss, or destruction is suffered by several freighters or owners of . . . property . . . on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses . . . .

46 U.S.C. § 184 (1976). Read literally, only cargo owners are to share proportionately. The Act is silent on the fate of injury claimants, salvage claimants, or collision claimants, who are not usually owners of property aboard the vessel. Nevertheless, the Supreme Court, at its first opportunity, interpreted § 184 to mean that all claimants who can be compelled to interplead for the fund must share proportionately with each other. *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 127-28 (1871).

Gilmore and Black cite some ancient cases (none after 1907) in which the limitation fund was distributed according to lien priorities. G. GILMORE & C. BLACK, *supra* note 1, § 10-39, 928-29. On the strength of these cases, they question whether an admiralty court should ignore lien priorities, since a bankruptcy court would not ignore them. *Id.* at 930. The difference between bankruptcy and limitation procedure is that the distribution of the limitation fund is governed by the "pro rata" language of 46 U.S.C. § 184 (1976). In comparison, secured creditors in bankruptcy are *not* required to share pro rata to the extent of their interest in collateral. 11 U.S.C. § 506(b) (Supp. 1981).

<sup>56</sup> See *Plamals v. S.S. "Pinar del Rio"*, 277 U.S. 151 (1928). Of course, most seamen who can assert the Jones Act may also join an action for unseaworthiness. The unseaworthiness claim carries lien status, and the Jones Act action may be joined with it. Richards, *Maritime Liens in Tort, General Average, and Salvage*, 47 TUL. L. REV. 569, 573-75 (1973).

<sup>57</sup> See *Richardson v. Harmon*, 222 U.S. 96 (1911) (limitation of liability is possible against nonmaritime claims). Gilmore and Black wonder whether an unsecured claimant such as a Jones Act plaintiff might be deemed behind all secured claimants when the limitation fund is distributed. G. GILMORE & C. BLACK, *supra* note 1, § 6-22, at 341. This concern obviously applies to nonmaritime claimants as well.

There is no justification for the view that pro rata sharing means that the secured claims get the entire fund before the unsecured claims get anything. As was stated, *supra* note 55, 46 U.S.C. § 184 (1976) states that only cargo claimants should share pro rata but that the Supreme Court has stated that all claims come within the pro rata provision. FED. R. CIV. P. SUPP. F(8) states that all claimants to the fund shall share pro rata. This language suggests no distinction between secured and unsecured creditors. Also, 46 U.S.C. § 183(a) (1976) states that the vessel owners' liability for any property loss, personal injury, collision, or "any act, matter, or thing, loss, damage or forfeiture" shall be limited to the value of the vessel plus earned freight. This

a party with a high priority lien (a salvor, for example) shares proportionally with a low priority lienholder (for instance, a cargo claim).<sup>58</sup>

### III. A SUGGESTION: THE LIMITATION ACT ESTOPS THE LIENS OF LIMITATION CLAIMANTS

It is beyond question that a limitation claimant who has arrested the vessel prior to the petition for limitation can be compelled to halt his action and to proceed further only in the limitation proceeding.<sup>59</sup> This is true even where the vessel owner has given a "letter of undertaking" to stand for suit in order to avoid the arrest of the vessel.<sup>60</sup> A limitation claimant's inability to enforce the lien outside of the limitation proceeding, coupled with pro rata sharing within the proceeding, seems to eliminate all aspects and features of a maritime lien.

Can we then proclaim that enforcement of the liens underlying the limitation claims is completely estopped, not only inter se but as against nonlimitation liens as well? Such a doctrine would solve the perplexing priority problems which might arise if nonlimitation liens compete with limitation liens for the proceeds of a vessel surrendered in a limitation proceeding. These priority problems will be laid out in due course,<sup>61</sup> but preliminarily it must be conceded that estoppel of limitation liens has the effect of reversing maritime priorities. A non-

language sounds as if each claim should be compensated somehow, whereas a distinction between secured and unsecured claims suggests that some will *not* be compensated. See also *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 417 (1954) ("The elaborate notice provisions [pertaining to the limitation proceedings] are designed to . . . ensure that all claimants, not just a favored few, will come in on an equal footing to obtain a pro rata share of their damages."); *Hartford Accident & Indem. Co. v. Southern Pac. Co.*, 273 U.S. 207, 215 (1927) ("[T]he fund is to be distributed to all established claims . . . whether they be liens in admiralty or not . . ."). Furthermore, the exoneration granted to the vessel owner is with regard to personal liability, not merely in rem liability. It is therefore likely that Congress intended to grant *every* claimant, whether secured or not, a piece of the fund in exchange for the exoneration of personal liability.

<sup>58</sup> See *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 122 (1871) (cargo lien and collision lien are equivalents under the Limitation Act). For examples of lien priorities, see *The William Leishear*, 21 F.2d 862 (D. Md. 1927) (high priority of salvage); *The St. Paul*, 277 F. 99 (S.D.N.Y. 1921) (low priority of cargo claims).

<sup>59</sup> See *The "Benefactor" S.S. Co. v. Mount*, 103 U.S. 239 (1880). But see *United States v. Ohio Valley Co.*, 510 F.2d 1184, 1188-89 (7th Cir. 1975) (Limitation Act does not apply to in rem claims). The *Ohio Valley* case may safely be dismissed as aberrant. In *re Oswego Barge Corp.*, 439 F. Supp. 312, 316-19 (N.D.N.Y. 1977), *aff'd in part, rev'd in part*, 664 F.2d 327 (2d Cir. 1981).

<sup>60</sup> In *re Moore*, 278 F. Supp. 260, 265-66 (E.D. Mich. 1968). Gilmore and Black wonder whether the letter of undertaking in *Moore* could be a "personal contract" against which there can be no limitation of liability. See *supra* note 20. In the end they concur in the *Moore* court's "sensible decision not to become entangled in such speculative matters." G. GILMORE & C. BLACK, *supra* note 1, § 10-26, at 902-03.

<sup>61</sup> See *infra* text accompanying notes 158-65. For now, the priority problem may be summarized as follows: Lien A is superior to Lien B, which is superior to Lien C. Lien A and Lien C are

limitation lien may be from an inferior category (repair or supply, for example) whereas the limitation lien may be comparatively prestigious (such as salvage). If enforcement of the salvage lien is estopped, the humble repair lien prevails. Also, a lien antecedent to the limitation voyage may fall within the same category as the limitation lien, as when both are tort claims. The limitation lien should win under the rule of "last in time, first in right." If enforcement of the limitation lien is estopped, however, the lien *first* in time prevails. In spite of the apparent violence done to maritime priorities, estoppel of limitation liens poses no risk of prejudice to the maritime rights of any interested party,<sup>62</sup> and it has the benefit of eliminating the insoluble priority problems which otherwise arise when limitation liens compete against nonlimitation liens.<sup>63</sup>

Estoppel of limitation liens<sup>64</sup> has never been declared to be the law by any court,<sup>65</sup> and at least one highly questionable case stands to the contrary.<sup>66</sup> The greater threat to a doctrine of estoppel lies in Federal Rules of Civil Procedure Supplemental Rule F(8).<sup>67</sup> This rule tracks section 184 of the Act in stating that distributions to limitation claimants must be pro rata and not according to maritime priorities. Rule F(8) also specifies that, in spite of this pro rata distribution, the admiralty court should save "to all parties any priority to which they may be legally entitled." This language is sufficiently ambiguous that it might be taken as precluding the suggested doctrine of estoppel, but closer analysis shows that the Supreme Court had no intent to preclude such a development when it promulgated the Rule.<sup>68</sup>

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limitation liens which are accorded equal status under the Limitation Act. Lien *B* is not subject to the Limitation Act. Lienholder *A* cannot assert priority over Lienholder *B* without also taking priority over Lienholder *C*, who is entitled to equal dignity with Lienholder *A*. Lien *B* may not take priority over Lien *C* without destroying Lien *A*'s top priority, and so forth. The problem is similar to the circular priorities described in 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 1020 (1965).

<sup>62</sup> See *infra* text accompanying notes 163-68.

<sup>63</sup> See *infra* text accompanying notes 158-63.

<sup>64</sup> The term estoppel is chosen to reflect the concept that the liens, although unassertable during a limitation proceeding, should revive if the limitation proceeding falls apart. The main point to be emphasized here is that in priority battles with nonlimitation liens, the limitation liens should always lose, so long as the limitation proceeding is alive.

<sup>65</sup> Recent cases avoid the issue. See *In re Zebroid Trawling Corp.*, 428 F.2d 226, 228-29 (1st Cir. 1970) (liens given effect in the limitation proceeding only); *In re Moore*, 278 F. Supp. 260, 265 n.8 (E.D. Mich. 1968) (lien status of limitation claimants "premature at this time").

<sup>66</sup> See *Rodco Marine Servs., Inc. v. Migliaccio*, 651 F.2d 1101 (5th Cir. 1981) (discussed *infra* text accompanying notes 130-65).

<sup>67</sup> FED. R. CIV. P. SUPP. F(8).

<sup>68</sup> The troublesome language from Rule F(8) appeared in the original admiralty rule which the Supreme Court promulgated in 1871. See Rule 55, 80 U.S. (13 Wall.) xiii (1871) (superse-  
ded).



First, a limitation claimant has almost no lien rights left after the Limitation Act is given effect. They have no priority against other claimants in a limitation proceeding and are restrained by injunction from joining an in rem proceeding elsewhere. This latter loss is particularly acute when the vessel owner has set up the limitation proceeding on the basis of a bond. In such a case, the vessel is still sailing about susceptible to arrest by any lienholder not enjoined from leaving the limitation proceeding. The only possible use the limitation claimant may have for a maritime priority arises when the vessel owner has surrendered the vessel to the limitation court. In a surrender case, the nonlimitation lienholders must intervene in the limitation proceeding in order to get at the vessel to which their liens attach. Only in this circumstance can a priority battle occur.

Since this is the only situation to which the language from Rule F(8) can possibly apply, we may note that, according to Rule F(8), *claimants* share pro rata in the fund but that *parties* are not to be denied their maritime lien priority. Rule F(8) is consistent, therefore, with a doctrine of estoppel: claimants share pro rata in the fund, but parties who are not claimants under the Limitation Act (i.e., nonlimitation lienholders) do *not* share pro rata. As will be shown, these two propositions are hopelessly inconsistent unless it is true that the limitation claimants are "legally entitled" to no liens at all. It is unlikely that the Supreme Court intended by this language to condemn the admiralty courts to sort out the circularity problems which otherwise arise in maritime priorities. The concept of estoppel is so easy to administer and is so entirely fair to the parties that the Supreme Court cannot possibly have intended to preclude such a solution in light of the ambiguous language in Rule F(8).<sup>99</sup>

Having done our best with Rule F(8), we proceed to examine the priority problems created by competition between limitation liens and nonlimitation liens and also to discuss the fairness of an estoppel. But first, we need to say a word or two about liens antecedent to the limitation voyage, perhaps the most common type of lien not subject to the Limitation Act.

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<sup>99</sup> The language from Rule F(8) may be disregarded for another reason. Whether the Limitation Act destroys the limitation liens by implication is a question of congressional intent. If Congress did intend destruction of these liens, nothing in a court rule could possibly contravene this intent. In addition, the exact language states that "parties" shall be preserved the priority to which they are "legally entitled." If they are not legally entitled to any priority at all (because the Limitation Act has repealed their priority for the duration of the limitation proceeding), then Rule F(8) saves to limitation claimants nothing at all.



#### IV. ANTECEDENT MARITIME LIEN CLAIMANTS AND THE LIMITATION FUND

As has been stated, a vessel owner may seek to limit his liability only when claims against him *during a single voyage* exceed the value of the vessel and freight.<sup>70</sup> Thus, antecedent claimants—those whose claims predate the limitation voyage—end up in a position much superior to that of creditors who can be compelled to intervene in the limitation proceeding. First, antecedent lienholders may always pursue their in personam claims against the vessel owner,<sup>71</sup> until such time as bankruptcy or a statute of limitations<sup>72</sup> alters their rights. Second, since prior claimants may not be compelled to enter into the limitation proceeding, they are not deprived of their maritime liens. If they can find the vessel, they can arrest it.

Whatever problems may arise from priority battles between antecedent lienholders and limitation claimants, it is clear they exist only when the vessel owner opts to surrender the vessel to the limitation court. Only then do antecedent lienholders have cause to intervene in a limitation proceeding. When the vessel owner posts a bond in lieu of surrender, the priority battle cannot occur. Therefore, we must distinguish between surrender cases, on the one hand, and bond-posting cases on the other.

In bond-posting cases, the vessel is not physically handed over to a trustee, and so it may still be pursued by in rem process. And because the prior claim may not be subject to limitation, the prior claimant can pursue the vessel owner in personam at his leisure. Where the bond is executed for the benefit of the limitation claimants, the antecedent lienholders may not intervene and claim the bond proceeds, since the bond and the vessel are not equivalent in terms of lien rights.<sup>73</sup>

Furthermore, section 185 of the Act clearly reads that the amount of the bond must cover the value of the vessel plus freight and other required amounts. Courts have had no trouble ruling that the value of the vessel means its unencumbered value.<sup>74</sup> Indeed, where a

<sup>70</sup> *La Bourgogne*, 210 U.S. 95, 135 (1908); *The City of Norwich*, 118 U.S. 468, 491 (1886).

<sup>71</sup> *Gokey v. Fort*, 44 F. 364, 366 (S.D.N.Y. 1890).

<sup>72</sup> *E.g.*, 46 U.S.C. § 763(a) (Supp. III 1979) (three years for personal injury or death); 46 U.S.C. § 1303(6) (1976) (one year for COGSA cargo claims). If no statute of limitations applies, maritime claims are limited by the doctrine of laches. G. GILMORE & C. BLACK, *supra* note 1, § 9-79.

<sup>73</sup> *Cf. Hawgood & Avery Transit Co. v. Dingman*, 94 F. 1011 (8th Cir. 1899) (bond in an in rem case executed for those who already had interceded in the case; new claimant not a party to the bond had to pursue the vessel, which, thanks to the bond, was still at large).

<sup>74</sup> "[A] stipulation must be filed to protect the limitation claimant in the amount of the value of the vessel. To do any less would mean that petitioner is limiting claims beyond the authority of

preferred ship mortgage is in the picture, or where there are large tort or collision liens antedating the limitation voyage, the value of the vessel owner's interest could be nil if the courts considered only the vessel owner's equity interest after the liens are given effect. In addition, where the antecedent lien amounts are unliquidated—as would be the case with torts not reduced to judgment—it would be impossible to calculate the vessel owner's remaining equity in his vessel after encumbrances. Finally, reduction of the bonded amounts for antecedent liens would be a windfall to the vessel owner simply because he has not paid his debts when due. A vessel owner may not reduce the limitation fund below the unencumbered value of the vessel for such an illegitimate reason.<sup>75</sup> For these reasons, the amount covered by the bond must equate with the unencumbered value of the vessel, plus earned freight. The application of this rule in bond cases preserves all legitimate expectations of the parties. Antecedent lienholders may proceed against the vessel at will. Limitation claimants need not share the limitation fund with nonlimitation claims. The vessel owner pays what Congress intended—the value of the vessel at the end of the voyage, plus earned freight.

The "surrender" cases pose more difficult problems because they raise the possibility of a priority battle with antecedent liens. Thus, if the vessel is surrendered "as encumbered," who, between the limita-

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the statute." *In re Zebroid Trawling Corp.*, 428 F.2d 226, 229 (1st Cir. 1970); *In re Pacific Bulk Carriers, Inc.*, 1975 A.M.C. 1145, 1149 (S.D.N.Y. 1975); *The H.F. Dimock*, 186 F. 662, 663 (S.D.N.Y. 1910); *In re The U.S. Grant*, 45 F. 642, 643 (S.D.N.Y. 1891); *The Giles Loring*, 48 F. 463, 473 (D. Me. 1890).

<sup>75</sup> To be distinguished from the requirement that the vessel owner is liable for the unencumbered value of the vessel (plus freight) is the process by which the vessel is valued at the end of the voyage. The value must reflect the state of the vessel after a collision, if the collision ends the voyage. Thus, in *The City of Norwich*, 118 U.S. 468, 471 (1886), the guilty vessel was salvaged from the ocean bottom and was brought to New York, where it had a value of \$25,000. The owner, however, had spent \$22,500 in recovering the vessel. The Commissioner appointed to appraise the value of the vessel took his task to be ascertaining the value prior to salvage and just after the collision, which was found to be the "end" of the voyage. The Commissioner simply subtracted the cost of recovery (\$22,500) from the value of the salvaged vessel (\$25,000) to arrive at the value of the vessel after the collision (\$2,500). In this case, the unencumbered value of the vessel was only \$2,500, not \$25,000, so it may not be said that the vessel owner contributed the "encumbered" value. It is true, however, that, if the vessel itself had been surrendered, the owner (as subrogee to the salvage or repair lienholders) would have received \$22,500 before the limitation claimants received anything. Justice Bradley defended this result on the basis that the \$22,500 was "value added" after the voyage had ended. *Id.* at 493 ("[I]t enables the owner to lay out money in recovering and repairing the ship, without increasing the burden to which he is subjected."); see *id.* at 493, 502. The vessel owner's receipt of \$22,500 must be taken as evidence that those who provided the recovery services have a maritime lien priority over the limitation claimants. These liens, to which the vessel owner is subrogated, are "subsequent" liens not subject to the Limitation Act. See *infra* text accompanying notes 165-70.

tion claimants and the antecedent lienholders, will first be paid out of the proceeds from the sale of the vessel?<sup>76</sup>

The implications of this question must be emphasized. If prior claimants are permitted to take 100% of their claims off the top before the limitation claimants are entitled to divide the remaining proceeds, the limitation fund, of course, is greatly threatened with reduction. And, as stated above, these antecedent liens will almost always be of a status inferior to those which the limitation claimants could assert, if the petition for limitation were not allowed, i.e., the antecedent liens will be first in time or will be in a category below the tort liens usually found in a limitation proceeding. In addition, unhealthy commercial incentives might be created if the limitation fund were to be reduced by the obligation to satisfy 100% of the antecedent liens from the proceeds generated by the sale of the vessel. If this were the rule, a vessel owner benefits greatly by surrendering the vessel whenever prior claims are substantial. Surrender of the vessel would not end the vessel owner's in personam liability to prior claimants, but where the vessel owner is on the brink of insolvency (a circumstance clearly suggested by the existence of large outstanding liens), the prior claimants would be forced to pursue the vessel and not the vessel owner. This is especially true because the limitation proceeding involves an in rem sale of the vessel which wipes it free of all unasserted maritime liens.<sup>77</sup> Thus, the limitation fund is the last chance that antecedent lienholders will have to foreclose.<sup>78</sup> It can be seen, then, that a vessel owner could arrange for the limitation fund to discharge antecedent claims, at the expense of the limitation claimants,<sup>79</sup> many of whom are literally quite likely to be widows and orphans.<sup>80</sup>

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<sup>76</sup> This was the precise question presented in *Rodco Marine Servs., Inc. v. Migliaccio*, 651 F.2d 1101 (5th Cir. 1981).

<sup>77</sup> See *infra* text accompanying notes 178-90.

<sup>78</sup> The *Pelotas*, 21 F.2d 236 (E.D. La. 1927), is not to the contrary. There, a limitation fund was to be established by surrender of the vessel. A claimant with a lien subsequent to the voyage caused the vessel to be arrested before an in rem sale but after the surrender. The vessel owner bailed the vessel, so that it could be sold in the limitation proceeding, and then sought to dismiss the libel in rem on the grounds that property *in custodia legis* could not be libeled. The proper procedure, said the vessel owner, was for the subsequent lienholder to intervene in the limitation proceeding. The court found it unnecessary to consider these excellent arguments, in that the subsequent lienholder was proceeding against the bond posted by the vessel owner, not against the vessel itself. It is respectfully submitted that, if the vessel owner had not so hastily posted the bond, the subsequent lienholder would have been forced to intervene in the limitation proceeding. A maritime lienholder should not be able to arrest a vessel already within the court's jurisdiction.

<sup>79</sup> This curious transfer of responsibility from the vessel owner to the tort victims (and others) in the limitation proceeding would not occur—at least for the personal injury and wrongful death claimants—when the Loss of Life amendments apply. As stated earlier, the \$60 per ton

It is universally agreed that antecedent liens should not reduce the limitation fund,<sup>81</sup> and the Act is at least consistent with that view. Section 183(a)<sup>82</sup> limits liability to the value of the owner's vessel and freight. This ought to be taken to mean the owner's interest irrespective of the encumbrances which always float about the vessel in the maritime business.<sup>83</sup>

The question thus presents itself: In a surrender case, how can we allow the surrender of the vessel, preserve lien status of nonlimitation claimants, and still provide the limitation claimants with a fund equal to the full unencumbered value of the vessel?

### V. THE GILMORE AND BLACK ANSWER

In order to prevent antecedent lien claimants from reducing the limitation fund, Gilmore and Black endorse a rule whereby the vessel owner's right to file a petition for limitation of liability is made contingent upon discharge of all antecedent liens.<sup>84</sup> Such a condition precedent was required by a few courts in the last century,<sup>85</sup> and other admiralty treatises assert the rule without question.<sup>86</sup>

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fund provided by these amendments comes into existence when the vessel is oceangoing and when the portion of the limitation fund which the personal injury and wrongful death claimants would get does not amount to \$60 per registered ton of the vessel. 46 U.S.C. § 183(b), (c) (1976). If their share is less than \$60 per ton, then the Loss of Life amendments provide that their share shall be increased to \$60 per ton. The part of that fund which comes from the sale of the vessel depends upon the personal injury claimants' share of the proceeds of the original limitation fund.

Applying this learning to prior lien claimants, whatever portion of the vessel they can take in satisfaction of their liens will not affect the personal injury claimants. As the value of the vessel declines because of prior encumbrances, the vessel owner would be compelled to contribute additional money to the personal injury fund to guarantee that it equals exactly \$60 per registered ton.

<sup>80</sup> E.g., *In re Zebroid Trawling Corp.*, 428 F.2d 226 (1st Cir. 1970) (widow's wrongful death action).

<sup>81</sup> See *id.* at 229; *In re Pacific Bulk Carriers, Inc.*, 1975 A.M.C. 1145, 1148-49 (S.D.N.Y. 1975) (bond amount and surrender amount should be identical); *The Pelotas*, 21 F.2d 236, 239 (E.D. La. 1927); *The H.F. Dimock*, 186 F. 662, 663 (S.D.N.Y. 1910) (same); G. GILMORE & C. BLACK, *supra* note 1, § 10-48.

<sup>82</sup> 46 U.S.C. § 183(a) (1976).

<sup>83</sup> See *The City of Norwich*, 118 U.S. 468, 492-93 (1886) (the standards for bond-posting and surrender cases ought to be the same).

<sup>84</sup> G. GILMORE & C. BLACK, *supra* note 1, § 10-48.

<sup>85</sup> E.g., *In re The U.S. Grant*, 45 F. 642 (S.D.N.Y. 1891); *The Leonard Richards*, 41 F. 818 (D.N.J. 1890). It is not clear that either of these cases involve surrender of the vessel. The condition precedent rule seems to have been applied in *China Union Lines, Ltd. v. A.O. Andersen & Co.*, 364 F.2d 769, 792 (5th Cir. 1966), *cert. denied*, 386 U.S. 933 (1967).

<sup>86</sup> 3 E. BENEDICT, *THE AMERICAN ADMIRALTY* 458 (6th ed. 1940); R. HUGHES, *HANDBOOK OF ADMIRALTY LAW* § 186 (2d ed. 1920); G. ROBINSON, *HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES* 928-30 (1939).

It is universally agreed that antecedent liens should not reduce the limitation fund,<sup>81</sup> and the Act is at least consistent with that view. Section 183(a)<sup>82</sup> limits liability to the value of the owner's vessel and freight. This ought to be taken to mean the owner's interest irrespective of the encumbrances which always float about the vessel in the maritime business.<sup>83</sup>

The question thus presents itself: In a surrender case, how can we allow the surrender of the vessel, preserve lien status of nonlimitation claimants, and still provide the limitation claimants with a fund equal to the full unencumbered value of the vessel?

### V. THE GILMORE AND BLACK ANSWER

In order to prevent antecedent lien claimants from reducing the limitation fund, Gilmore and Black endorse a rule whereby the vessel owner's right to file a petition for limitation of liability is made contingent upon discharge of all antecedent liens.<sup>84</sup> Such a condition precedent was required by a few courts in the last century,<sup>85</sup> and other admiralty treatises assert the rule without question.<sup>86</sup>

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fund provided by these amendments comes into existence when the vessel is oceangoing and when the portion of the limitation fund which the personal injury and wrongful death claimants would get does not amount to \$60 per registered ton of the vessel. 46 U.S.C. § 183(b), (c) (1976). If their share is less than \$60 per ton, then the Loss of Life amendments provide that their share shall be increased to \$60 per ton. The part of that fund which comes from the sale of the vessel depends upon the personal injury claimants' share of the proceeds of the original limitation fund.

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<sup>80</sup> E.g., *In re Zebroid Trawling Corp.*, 428 F.2d 226 (1st Cir. 1970) (widow's wrongful death action).

<sup>81</sup> See *id.* at 229; *In re Pacific Bulk Carriers, Inc.*, 1975 A.M.C. 1145, 1148-49 (S.D.N.Y. 1975) (bond amount and surrender amount should be identical); *The Pelotas*, 21 F.2d 236, 239 (E.D. La. 1927); *The H.F. Dimock*, 186 F. 662, 663 (S.D.N.Y. 1910) (same); G. GILMORE & C. BLACK, *supra* note 1, § 10-48.

<sup>82</sup> 46 U.S.C. § 183(a) (1976).

<sup>83</sup> See *The City of Norwich*, 118 U.S. 468, 492-93 (1886) (the standards for bond-posting and surrender cases ought to be the same).

<sup>84</sup> G. GILMORE & C. BLACK, *supra* note 1, § 10-48.

<sup>85</sup> E.g., *In re The U.S. Grant*, 45 F. 642 (S.D.N.Y. 1891); *The Leonard Richards*, 41 F. 818 (D.N.J. 1890). It is not clear that either of these cases involve surrender of the vessel. The condition precedent rule seems to have been applied in *China Union Lines, Ltd. v. A.O. Andersen & Co.*, 364 F.2d 769, 792 (5th Cir. 1966), *cert. denied*, 386 U.S. 933 (1967).

<sup>86</sup> 3 E. BENEDICT, *THE AMERICAN ADMIRALTY* 458 (6th ed. 1940); R. HUGHES, *HANDBOOK OF ADMIRALTY LAW* § 186 (2d ed. 1920); G. ROBINSON, *HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES* 928-30 (1939).



Although Gilmore and Black admit that authority is "scant,"<sup>87</sup> they set forth reasons in support of the condition precedent. The existence of antecedent claims, they note, implies that the vessel owner is on the brink of insolvency. The vessel owner, therefore, will soon be out of business. The purpose of the Limitation Act, however, is to keep vessel owners in business who would otherwise be ruined by liability from a major disaster. There is no purpose to applying the benefits of the Limitation Act, they say, to an owner who is insolvent. If the condition precedent rule were to be the law, limitation petitions by insolvent vessel owners would have to be denied for failure to meet the condition precedent. With the demise of the limitation proceeding, the limitation claimants would be free to pursue the vessel in an in rem action where they could assert their natural lien priorities. They can also share with antecedent claimants—and nonmaritime general creditors—in the bankrupt estate.<sup>88</sup>

The rationale offered by Gilmore and Black—the sabotage of limitation proceedings for insolvent vessel owners—leads them to the position that the condition precedent rule should be applied both in cases where the vessel owner establishes the limitation fund by posting a bond and in cases where the fund is established by surrendering the vessel.<sup>89</sup> In either case, the condition precedent rule stands, in their view, as an obstacle which an insolvent party would be hard pressed to overcome.

The basic premise of Gilmore and Black—that insolvent vessel owners will be prevented from limiting liability—can be faulted for

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<sup>87</sup> G. GILMORE & C. BLACK, *supra* note 1, § 10-48, at 950.

<sup>88</sup> *Id.* at 952. Gilmore and Black make an uncanny error when they assume that a tort claimant freed from a limitation proceeding would have a high priority claim in bankruptcy and could therefore take precedence over ship mortgagees. *See id.* at 954 ("Apart from the limitation proceeding, the widow could claim in the bankruptcy proceeding for the unpaid balance of her judgment and, since her claim is based on a high-order maritime lien, would in all probability be given priority over the claims of competing creditors . . ."); *see also id.* § 10-40, at 933 (nonlimitation claimants can pursue assets other than the vessel in bankruptcy, where "they may be expected to come out with priority over most competing claims"); *id.* § 10-48, at 955 (general creditors would be subordinated to the widow's high-priority claim "on one theory or another"). I am sure that, under cross-examination, they would quickly concede that the widow's high-priority maritime lien is in the vessel and, perhaps, freight, not in the bankrupt estate. Since vessel owner estates consist largely of freight past earned, a clever maritime claimant may some day argue that a lien priority on freight is essentially a lien priority on the estate itself, but such an argument runs into the holding of *Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp.*, 306 F.2d 188 (9th Cir. 1962) (the lien attaches only to the freight earned from the voyage on which the secured claim arose). Absent such contrivances, no special priorities attach to maritime claims in bankruptcy. *See generally* Landers, *The Shipowner Becomes a Bankrupt*, 39 U. CHI. L. REV. 490 (1972).

<sup>89</sup> *See* G. GILMORE & C. BLACK, *supra* note 1, § 10-48, at 952 n.212.

overlooking the obvious impact of insurance. Elsewhere in their treatise, Gilmore and Black assure us that most vessel owners carry liability insurance.<sup>90</sup> To the insurance company, it makes a great deal of difference whether limitation of liability is available or not.<sup>91</sup> Therefore, if the condition precedent is accepted as the law, insurance companies will discharge the prior liens themselves where the net result is a savings to them.<sup>92</sup>

There is a better rationale for the condition precedent rule than that offered by Gilmore and Black. The condition precedent of discharging all antecedent liens would guarantee that the limitation claimants will get the full amount of the limitation fund without having to share it with antecedent lienholders. If the antecedent lienholders must be paid off before the limitation proceeding can begin, all danger that their liens will reduce the fund disappears.

This stronger justification—preservation of the limitation fund for the limitation claimants—leads to a narrower scope of the condition precedent rule. To preserve the limitation fund, the rule need be applied only in the surrender cases, not the bond-posting cases. In the bond-posting cases, courts have always held that the amount guaranteed by the bond must represent the full unencumbered value of the vessel.<sup>93</sup> When this amount is posted, the limitation claimants have received all the benefits the Limitation Act gives them. The antecedent lienholders have no claim on the limitation funds in such a case. Their liens lie against the vessel, which is still at large, thanks to the posting of the bond. Therefore, no need exists to require that nonlimitation liens be discharged.<sup>94</sup>

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<sup>90</sup> *Id.* § 2-1; see also *Keen v. Overseas Tankership Corp.*, 194 F.2d 515, 518 (2d Cir. 1952) ("Substantially all maritime risks are insured . . .").

<sup>91</sup> *But see Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 417 (1954) (plurality opinion). Under Louisiana's unique provision for direct actions against insurance companies, the insurers would be indifferent to the vessel owner's ability to limit liability. According to the procedure set forth in the *Maryland Casualty* opinion, the insurance company must make the vessel owner good for the value of the vessel and earned freight (i.e., the limitation fund established by the vessel owner) and then must contribute the balance of the covered amount to the limitation claimants. Its liability is not therefore lessened if the vessel owner limits liability. See generally Buglass, *Limitation of Liability from a Marine Insurance Viewpoint*, 53 TUL. L. REV. 1363, 1388 (1979). Outside Louisiana, the benefit to insurers is clear. *Id.* at 1364 (insurance premiums would increase up to 30% but for the Limitation Act).

<sup>92</sup> See *In re Zebroid Trawling Corp.*, 428 F.2d 226, 229 (1st Cir. 1970) (obligations that accrued prior to voyage remain unaffected by limitation proceeding); *China Union Lines, Ltd. v. A. O. Andersen & Co.*, 364 F.2d 769, 792 (5th Cir. 1966) ("It was to its advantage, and the advantage of its underwriters, to free the [vessel] of the Government's statutory [and nonlimitation] lien, and secure the decree of injunction.").

<sup>93</sup> See *supra* text accompanying notes 73-75.

<sup>94</sup> Where the vessel is completely lost, and where there is no earned freight and no personal injury fund, no bond need be filed. *In re The Boat Camden, Inc.*, 569 F.2d 1072 (1st Cir. 1978).



In the surrender cases, the condition precedent rule is an absolute necessity. When the vessel owner surrenders the vessel, the rights of the antecedent lienholders lie against the vessel which is the foundation of the limitation fund, and their liens still attach to the fund after the in rem sale of the vessel. These lienholders must therefore be discharged prior to a limitation proceeding. The condition precedent rule may therefore safely be limited to the surrender cases. Here, and only here, the antecedent lienholders threaten the integrity of the limitation fund.<sup>95</sup>

In large part because they extend the condition precedent rule to the bond-posting cases, Gilmore and Black feel that the decision in *F/V Zebroid*<sup>96</sup> stands in the way of their condition precedent rule. They read this case as barring the condition precedent altogether in limitation proceedings.<sup>97</sup> Granted, the opinions in *Zebroid* are more than a little opaque,<sup>98</sup> but a close reading of them yields the conclusion that the court of appeals never intended to obliterate the condition precedent rule, as Gilmore and Black supposed. In fact, the court draws the distinction and rests upon the rationale that I have asserted to be superior: The condition precedent rule does not extend to bond-posting cases, because the existence of antecedent liens does not threaten to reduce the limitation fund. In bond cases, the court assumes, the bond amount must cover the unencumbered value of the vessel.<sup>99</sup> But in surrender cases, where antecedent liens threaten the

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In such a case, it is sufficient if the vessel owner merely offers to make good on any sum required by the Limitation Act. *Oil Transp. Co. v. Verret*, 278 F.2d 464, 467 (5th Cir. 1960), *vacated as moot*, 365 U.S. 768 (1961); see Staring, *supra* note 40, at 1145. With regard to the condition precedent of discharging antecedent liens, no interest of the limitation claimants would be served by imposing such a rule when there is no limitation fund to protect. Therefore, this case should be treated like the bond-posting cases: No condition precedent rule applies.

<sup>95</sup> Limitation of liability under the Act not only gives rise to a limitation proceeding, where the vessel owner can cause a *concursum* after establishing a fund, but it also may be pleaded as a defense in and out of admiralty. Thus, a vessel owner faced with a large claim can plead exoneration beyond the value of the vessel and earned freight. *The Scotland*, 105 U.S. 24, 33-34 (1882); Pelaez, *A Trip Through the Looking Glass—Asserting the Right to Limit Liability in Admiralty*, 19 Duq. L. Rev. 265, 308-09 (1981). Obviously, the condition precedent rule has no place in a defensive pleading of the Limitation Act. The purpose of the rule is to guarantee the integrity of the limitation fund in the *concursum*. A vessel owner whose petition for limitation of liability is dismissed for failure to discharge antecedent or other nonlimitation liens may therefore still plead limitation of liability as a defensive matter.

<sup>96</sup> 1970 A.M.C. 113 (D. Mass. 1969), *aff'd sub nom. In re Zebroid Trawling Corp.*, 428 F.2d 226 (1st Cir. 1970). For a discussion of the *Zebroid* decision, see *supra* text accompanying notes 37-40.

<sup>97</sup> G. GILMORE & C. BLACK, *supra* note 1, § 10-48, at 953.

<sup>98</sup> "The facts of *The Zebroid*, so far as they can be determined from the two brief opinions which were delivered in the case, are obscure and some aspects of the holding are, at least to this writer, equally obscure." *Id.* at 952.

<sup>99</sup> See *infra* text accompanying note 127.

limitation fund, the court rules that the vessel owner may not permit the limitation fund to be reduced by antecedent liens.<sup>100</sup> In citing some condition precedent cases in this context, the court actually endorses the condition precedent rule, but only when the vessel is surrendered.<sup>101</sup> Thus, *Zebroid*, in my view, was correctly decided and consistent with what the law ought to be.

Unfortunately, *Zebroid* has been misunderstood not only by Gilmore and Black but by the Fifth Circuit.<sup>102</sup> Both supposed *Zebroid* to stand against the condition precedent rule in *any* context. For this reason, a careful exegesis will be useful.

The story begins on January 4, 1968, when Captain Manchester of the *Zebroid* was washed overboard five days out of Newport, Rhode Island. On April 10, 1968, the preferred ship mortgagee, an antecedent lienholder, caused the *Zebroid*'s arrest in order to foreclose its mortgage.<sup>103</sup> The vessel was sold for \$45,000, which was paid into the admiralty court registry and became the in rem fund.<sup>104</sup>

On May 22, 1968, Manchester's widow intervened, asserting her tort lien, which was superior to that of the mortgagee.<sup>105</sup> Her claim was sufficiently large that it exceeded the value of the *Zebroid* (\$45,000), hence entitling the *Zebroid* Trawling Corp., owner of the vessel, to limit liability. Accordingly, the vessel owner filed its petition for limitation of liability on July 3, 1968, asking in an ex parte motion that the in rem fund be used as the limitation fund.<sup>106</sup> On December 31, 1968, the limitation court (per Judge Garrity) agreed, and therefore ordered the in rem fund transferred to the limitation proceeding.<sup>107</sup> The court also ordered the widow to halt litigation in any other forum other than the limitation proceeding.<sup>108</sup> The limitation proceeding had therefore weighed anchor and was underway.

The mortgagee, however, was now left without a res upon which to execute. It was forced, therefore, to intervene in the limitation proceeding to protest the transfer of the in rem fund. Upon the

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<sup>100</sup> See *infra* text accompanying note 125.

<sup>101</sup> See *infra* text accompanying note 124.

<sup>102</sup> *Rodco Marine Servs., Inc. v. Migliaccio*, 651 F.2d 1101 (5th Cir. 1981). After ruling that there is no statutory justification for the condition precedent rule, the *Rodco* court stated, "We believe this holding comports with the reason of the First Circuit in . . . *The Zebroid* . . ." *Id.* at 1106. For a discussion of the *Rodco* decision, see *infra* text accompanying notes 130-65.

<sup>103</sup> *In re Zebroid Trawling Corp.*, 428 F.2d 226, 227 (1st Cir. 1970).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> 1970 A.M.C. at 114.

<sup>107</sup> *Id.*

<sup>108</sup> 428 F.2d at 227.

mortgagee's motion, Judge Garrity repented, and his narrow holding was that the transfer order should be reversed.<sup>109</sup> His dicta were a good deal broader than his holding, however. Judge Garrity noted that since the Zebroid had been sold in the in rem proceeding, the Zebroid Trawling Corp. was a "former" vessel owner. Only *current* vessel owners could limit liability, Judge Garrity thought, not a former owner, and especially not a bankrupt former owner.<sup>110</sup> Ironically, Judge Garrity relied upon the very policy of Gilmore and Black which was discussed above: "Unless, after a limitation decree, the owner is in a position to continue operating his ships, there is no reason to grant limitation in the first place."<sup>111</sup> The irony is that whereas Gilmore and Black make this statement in support of the condition precedent rule, Judge Garrity bootstrapped this statement into a revolutionary new legal principle: that former vessel owners could *never* limit liability, since they would not be continuing to operate their ships.

Judge Garrity also felt that the transfer of the in rem fund "would conflict with the well-settled rule that prior liens on the vessel must be independently paid or secured"<sup>112</sup>—i.e., the condition precedent rule. What he must have meant by this is that if the transfer were allowed, the mortgagee would have no choice but to intervene in the limitation proceeding, because that was where the res was located. In the limitation proceeding, the vessel owner would have to discharge the lien because of the condition precedent rule, since the vessel owner must always contribute "the value of the whole vessel" to the limitation fund.<sup>113</sup> Judge Garrity's logic in this regard is not completely seaworthy. Judge Garrity did not really address the issue of why the transfer should not have taken place. A more direct answer would have been preferable: The transfer should not have taken place because the owner's right to surrender the vessel is lost when an antecedent lienholder has caused the vessel to be arrested.<sup>114</sup>

The court of appeals, led by Judge Aldrich, affirmed on the narrow grounds upon which Judge Garrity had ruled: the transfer of

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<sup>109</sup> "The libellant in the foreclosure action, [the] First National Bank of Cape Cod, moved in this case to intervene and for revocation of the order of December 31, 1968." 1970 A.M.C. at 114. "The intervenor's motion is allowed and the court's order entered December 31, 1968, is revoked." *Id.* at 115.

<sup>110</sup> *Id.* at 114.

<sup>111</sup> *Id.* (citing G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 10-49, 747-48 (1st ed. 1957)).

<sup>112</sup> *Id.* at 115.

<sup>113</sup> *Id.*

<sup>114</sup> See *supra* text accompanying notes 93-95 and 98-101.

the in rem fund was inappropriate.<sup>115</sup> In affirming, Judge Aldrich disagreed, quite rightly, that former owners could never limit liability. Indeed they could, Judge Aldrich thought,<sup>116</sup> and so ended Judge Garrity's revolutionary attempt to remake limitation law.

Judge Aldrich, however, affirmed on Judge Garrity's second ground, which had been based loosely on the condition precedent rule. In doing so, Judge Aldrich shed some additional light on what this second ground was.

The vessel owner had argued to the court of appeals that, but for the limitation proceeding, the mortgagee would have lost out to the widow. Even if the in rem fund were to be transferred to the limitation fund, the lien priorities of each would survive, and the mortgagee would still lose. Therefore, concluded the vessel owner, the mortgagee was not harmed when the in rem fund was transferred.<sup>117</sup>

This argument was deemed by Judge Aldrich to be a "misconception."<sup>118</sup> The meaning of the Limitation Act, he said, was that limitation liens had to be enforced in the limitation proceeding and nowhere else.<sup>119</sup> To these limitation liens, the vessel owner must tender the full value of the vessel.<sup>120</sup> But antecedent liens could not be affected by the injunction of the limitation court, which forces the

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<sup>115</sup> The bank then moved for leave to intervene in the limitation proceeding. Its motion was allowed, and after hearing the court revoked its previous allowance of Trawling's motion to apply the fund in the registry of the court as security. Trawling appeals. . . . We affirm on a restatement of [Judge Garrity's] second ground.

428 F.2d at 227-28.

<sup>116</sup> *Id.* at 228.

<sup>117</sup> This restatement of Zebroid Trawling Corp.'s argument is drawn from this language: Trawling argues that since the widow's claim has priority over the bank [i.e., the mortgagee] and the other lienor, Trawling has a right to have the court assign the sale proceeds to the widow's account in the limitation proceeding. Trawling says that if her claim is valid these lienors, being inferior, will be wiped out, and if not, they will not be hurt.

*Id.* The "other lienor" seems to be the Neptune Oil Corp., whose attorney is listed as present at the oral argument in the district court. 170 A.M.C. 113, 114 (D. Mass. 1969). Presumably, this claimant had a supply lien, which would be inferior to the widow's lien and to the mortgagee's lien. Under 46 U.S.C. § 953(a) (1976), preferred ship mortgages take precedence over supply liens which accrue after recordation of the mortgage and indorsement of the mortgage on ship's papers.

<sup>118</sup> 428 F.2d at 228.

<sup>119</sup> "The right to limit claims to the value of the vessel applies only to the claims arising during the one voyage. . . . Liens attaching during the voyage will be subject to limitation, but this is to be effected in the court proceedings." *Id.* at 228-29 (citations omitted).

<sup>120</sup> "Such liens are not to be 'independently paid,' but, rather, the full value of the vessel must be tendered into court." *Id.* at 229.

*concursum*.<sup>121</sup> And "not affected" must mean that the in rem fund could not be transferred.<sup>122</sup>

The last paragraph of Judge Aldrich's opinion is crucial. He begins by saying that the "basic principle" on which his opinion rests is "universally accepted." That is why, he says, "there is little decisional authority" for it.<sup>123</sup> Unfortunately he did not specify what the "basic principle" was upon which everyone is supposedly in agreement, but he does cite two cases which assert the condition precedent rule.<sup>124</sup> Therefore, I opine that the "basic principle" upon which such universal harmony exists must be this: Whenever there are outstanding antecedent liens which threaten the right of limitation claimants to receive the unencumbered value of the vessel, the vessel owner must discharge them as a condition precedent to a limitation proceeding. "To do any less," says Judge Aldrich, "would mean that petitioner is limiting claims beyond the authority of the statute."<sup>125</sup> Based on this universal principle, Judge Aldrich gives procedural advice with regard to the future of Zebroid Trawling Corp.'s limitation proceeding: "Applied to the case at bar this does not mean that petitioner, or its *insurer*, must pay off prior [i.e., antecedent] liens, but merely that a stipulation must be filed to protect the limitation claimant in the amount of the value of the vessel."<sup>126</sup>

To summarize, if I have read *Zebroid* correctly, the First Circuit does not oppose the condition precedent rule in general. It approves of the rule for surrender cases. Its sole policy justification is just what it should be: preservation of the limitation fund for the limitation claimants. This policy does not require the condition precedent rule for the bond-posting cases, since the vessel owner must post the amount representing the unencumbered value of the vessel.<sup>127</sup> The First Circuit explicitly rejected the Gilmore and Black argument that the limitation proceeding should be sabotaged if it does not serve to keep the vessel owner in business.<sup>128</sup> The condition precedent rule, in its

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<sup>121</sup> "However, obligations which accrued prior to the voyage, not being subject to limitation, remain unaffected by the proceeding." *Id.*

<sup>122</sup> "Since vis-a-vis the owner they do not stand to be reduced, it must follow that he cannot throw the security interests of those lienors into the pot." *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> The opinions cited by Judge Aldrich are *In re The U.S. Grant*, 45 F. 642 (S.D.N.Y. 1891); *Fort v. Gokey*, 44 F. 364 (S.D.N.Y. 1890).

<sup>125</sup> 428 F.2d at 229.

<sup>126</sup> *Id.* (emphasis added).

<sup>127</sup> *Id.* at 228 ("[T]he 'value of the owner's interest' refers to the ship in specie . . . and not simply to his equitable interest . . .") (citations omitted).

<sup>128</sup> *Id.* ("We do not accept that reasoning. The purpose of the Act is to encourage the investment in ships, not simply to provide for its continuance.").

narrower and more appropriate version, is therefore alive and prosperous after *Zebroid*.

A final piece of evidence may be offered for the proposition that the condition precedent of discharging outstanding liens exists for surrender cases only. Supplemental Rule F(2)<sup>129</sup> requires all liens to be set forth in the petition for limitation of liability, whether they be limitation liens or nonlimitation liens, but the requirement exists only if the vessel owner elects to proceed by surrendering the vessel. No such list is required for bond-posting cases. This difference in requirements is consistent with the view that the condition precedent exists only for the surrender cases, not the bond-posting cases.

## VI. THE RODCO PROCEDURE

A much more formidable obstacle to the condition precedent rule appeared recently in *Rodco Marine Services, Inc. v. Migliaccio*,<sup>130</sup> where the Court of Appeals for the Fifth Circuit ruled that the condition precedent rule in surrender cases could not be sustained, due to lack of statutory support for it.<sup>131</sup> In that case, the vessel owner and his bareboat charterer jointly expressed a desire to surrender the *Good Boy*, a towing vessel operating on the Mississippi, to a court-appointed trustee. The district court denied the petition for limitation on the grounds that undischarged antecedent encumbrances existed on the vessel.

The court of appeals reversed and remanded, holding that a condition precedent requiring satisfaction of antecedent liens did not exist by statute or court rule. Instead, the court of appeals, in writing some guidelines for the district court, indicated that the petition should be *provisionally* accepted, the vessel should be sold, and the proceeds should be paid into the registry of the court. The instruction which followed was illuminating: "The court then determines the priority of the liens against the fund. If the entire fund is not available to the voyage claimants, distribution should be made to the proper lienors and the owner [should be] denied exoneration."<sup>132</sup> Since the court's instruction stands as the most recent authority on administering the limitation fund in light of antecedent liens, it deserves our careful attention.

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<sup>129</sup> FED. R. CIV. P. SUPP. F(2).

<sup>130</sup> 651 F.2d 1101 (5th Cir. 1981).

<sup>131</sup> *Id.* at 1103-06. In this regard, the *Rodco* court erroneously read *Zebroid* as mandating such a result, *see supra* note 102, no doubt because that is the way Gilmore and Black read it.

<sup>132</sup> *Id.* at 1106. By "exoneration," the court of appeals, *id.* at 1103 n.4, invokes 46 U.S.C. § 185 (1976), which states that, after surrendering the vessel and posting the required bonds "all claims and proceedings against the owner with respect to the matter in question shall cease."



### A. *Delay of the Moment of Reckoning*

First, the court asserts that nothing in the Act conditions limitation of liability upon satisfaction of antecedent liens,<sup>133</sup> and on this premise, the Gilmore and Black formulation of a condition precedent rule for surrender cases was rejected. But in the court's procedural guidelines, the requirement that antecedent liens be satisfied is introduced at a later stage of the proceeding. The court, then, contemplates (in what I shall call the "*Rodco* variant") that a vessel owner who has not satisfied antecedent liens is nevertheless provisionally entitled to his limitation proceeding. The proceeding, however, will be dismissed if, at the point of distribution of the fund, the antecedent liens have not been discharged by the vessel owner. The moment of reckoning for the vessel owner is thereby merely delayed, perhaps for a considerable length of time where litigation is complex.

The *Rodco* court, then, accepts that the vessel may not be surrendered without at some point doing something to remove the encumbrances. But in holding that no statutory authority exists for the condition precedent, the court has failed to read section 185 of the Act carefully. Section 185 not only authorizes but perhaps mandates the condition precedent. In order to see why this is true, we must reemphasize the premise upon which Gilmore and Black, the *Zebroid* court and even the *Rodco* court agree in some form—that the Limitation Act affirmatively requires the discharge of antecedent liens at *some* point prior to distribution of the fund.

Section 185 makes clear that the injunction against litigation by claimants in other courts shall not issue until *after* the vessel owner has either posted the bond or transferred to the trustee his interest in the vessel and earned freight, *together with whatever other sums are required by the Act*.<sup>134</sup> If antecedent liens appear in the vessel own-

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<sup>133</sup> 651 F.2d at 1104.

<sup>134</sup> The vessel owner . . . may petition a district court . . . for limitation of liability . . . and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

46 U.S.C. § 185 (1976).



er's complaint,<sup>135</sup> and if it is true that those liens must not reduce the limitation fund, then, before the *concursum* is ordered, the court is well justified in requiring that sums (or adequate security) be paid to the court (or otherwise discharged) to assure that the antecedent lien claimants will not reduce the limitation fund.<sup>136</sup> If the court is in the position to require sums or security to cover these antecedent liens, it may dismiss the complaint altogether if the sums are not paid or if the security is not posted. Obviously, this statutory mandate is breathtakingly close to a requirement that antecedent liens must be *discharged*, especially if "discharge" includes the concept of paying the lien amounts through the court as intermediary or of posting adequate security with the court for such payment.<sup>137</sup>

In refusing to allow a condition precedent while requiring the *Rodco* variant of discharge later in the proceeding, the *Rodco* court also ignores an analogous instruction given by the Supreme Court in *Black Diamond Steamship Corp. v. Robert Stewart & Sons*.<sup>138</sup> In this case, a collision between a British and an American vessel had occurred in Belgian waters. The American vessel owner petitioned for limitation of liability, arguing that Belgian law should apply. Under Belgian law, liability would have been limited to \$325,000.<sup>139</sup> Under the Limitation Act, liability would have been \$1,000,000. The district court dismissed for failure to post appropriate bond under section 185, which requires the posting of amounts equivalent to the value of the vessel and earned freight.

When the Supreme Court finally received the case, it reversed and remanded on the choice of law question.<sup>140</sup> The choice of law,

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<sup>135</sup> Under Supplemental Rule F(2), the petitioner is required to set forth all antecedent liens, although, as the *Rodco* court noted, this provision *alone* is not the same as a requirement to discharge such liens. 651 F.2d at 1104.

<sup>136</sup> See *In re Delphinus Maritima, S.A.*, 1981 A.M.C. 2385, 2388 (S.D.N.Y. 1981) ("The posting of proper security is a condition precedent to obtaining an injunctive order . . .").

<sup>137</sup> See *China Union Lines, Ltd. v. A. O. Andersen & Co.*, 364 F.2d 769, 792 n.26 (5th Cir. 1966) (vessel owner required to deposit money equivalent to a nonlimitation lien), *cert. denied*, 386 U.S. 933 (1967).

<sup>138</sup> 336 U.S. 386 (1949).

<sup>139</sup> *Id.* at 391.

<sup>140</sup> *Id.* at 398-99. The rationale for reversing and remanding was necessarily confusing because of the bizarre court of appeals decision in the *Black Diamond* case. See *United States v. Robert Stewart & Sons*, 167 F.2d 308 (2d Cir. 1948). The district court had decided that the limitation amount was not a substantive question (thought to be governed by the *lex loci delicti* as a choice of law) but was a remedial question governed by the law of the forum. Under American law, the required bond was insufficient. The Court of Appeals for the Second Circuit affirmed without making a choice of law. The court reasoned that if Belgian law applied, so that liability amounted to only \$325,028.79, then limitation was unavailable. Limitation under the Act required that claims against the vessel owner exceed the value of vessel and earned freight, the court of appeals noted. *Id.* at 308-09. That could never be the case where Belgian law limited all

the Supreme Court noted, would determine the size of the bond required under section 185. Therefore it was necessary to decide the choice of law question as a threshold matter—a condition precedent, as it were—before the limitation proceeding could commence in earnest:

A proceeding to limit liability is *ipso facto* a proceeding to limit recovery, and the amount of the applicable limit, like the value of the vessel and freight, is a question affecting the magnitude of the *res* from which recovery is sought. It is a question, therefore, which lies at the threshold of all claims, is equally relevant to all, and should accordingly be disposed of before any.<sup>141</sup>

The Supreme Court certainly felt that the amount of the limitation fund should be decided up front. *Black Diamond* is authority directly contrary to the *Rodco* variant. The *Rodco* variant places the judge in the position of ordering a *concursum* in violation of section 185, which requires that all sums mandated by the Act must, if possible,<sup>142</sup> be paid in advance.

### B. Unnecessary Denial of Jury Rights

A second point about the procedural guideline set out in *Rodco* is that the court seems to contemplate a metamorphosis of the unsuccessful limitation proceeding into an *in rem* proceeding, where maritime lien priorities govern. If, in the *Rodco* limitation proceeding, a high ranking antecedent lien were to appear—e.g., a salvage claim from a prior voyage—the limitation proceeding would change into an *in rem* proceeding, and the proceeds of the vessel would be divided according to maritime lien priorities, with all liens, including those incident to limitation claims, participating according to rank. In such a case, the salvage liens come first, with the most recent salvage lien taking priority over our hypothetical antecedent salvage lien. After salvage

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claims to a value less than the value of the vessel and freight. If Belgian law did *not* apply, dismissal was required because the required \$1,000,000 bond was not filed. *Id.* at 309.

The Supreme Court reversed, stating that if Belgian law applied, limitation was available because claims exceeded the Belgian limitation. 336 U.S. at 398. Also, dismissal for insufficient bond should not occur until petitioner had an ample opportunity to supply the requisite funds required by the court's eventual legal rulings.

As to the ultimate choice of law, the Supreme Court held that it was to turn on whether the Belgian limitation was substance or procedure. Such a determination would depend upon findings of fact on what the nature of the Belgian law was. *Id.* at 395-98. Hence the remand.

<sup>141</sup> *Id.* at 397-98.

<sup>142</sup> Of course, the personal injury fund mandated in 46 U.S.C. § 183(b) (1976), cannot be calculated in advance. See *supra* note 33.

come the tort victims. The preferred ship mortgage, of course, would be last in line.<sup>143</sup>

On its face, the metamorphosis is appropriate. The court has sold the vessel in an in rem sale and has deposited the proceeds in the court registry. The vessel has been wiped clear of liens, and any recovery on the liens must be from the fund created by the limitation court. The lienholders, in this sense, are well served by the metamorphosis.<sup>144</sup> The difficulty with this procedure is that, at the point at which the limitation petition is finally dismissed for failure to pay off antecedent liens, the tort victims and other claimants have been forced to litigate in admiralty court. Any rulings by the admiralty court on the merits of these claims are *res judicata* in future actions.<sup>145</sup> Absent the injunction which forced them into the proceeding, these tort victims would have been able to pursue their remedies outside admiralty, where it is possible to have a jury trial.<sup>146</sup>

There is certainly no constitutional bar to an admiralty judge who under the *Rodco* procedure keeps all the claimants before him and decides all the claims against the vessel owner.<sup>147</sup> But the Supreme Court has gone to impressive lengths to preserve the right of plaintiffs to litigate outside admiralty under the saving to suitors clause, while preserving the essentials of the Limitation Act for vessel owners. These cases suggest strongly that the Supreme Court would

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<sup>143</sup> An admiralty court could also proceed to render in personam judgments against the vessel owner, as well as in rem judgments against the fund, since the vessel owner has submitted himself to the jurisdiction of the court by filing his petition for limitation. *Hartford Accident & Indemn. Co. v. Southern Pac. Co.*, 273 U.S. 207, 217 (1927).

<sup>144</sup> See *The Mendota*, 14 F. 358, 363 (S.D.N.Y. 1882) (Benedict, J.) (approving the metamorphosis from limitation proceeding to in rem distribution).

<sup>145</sup> See *infra* note 151.

<sup>146</sup> Plaintiffs may leave the admiralty court and pursue any action elsewhere, provided they are entitled to a common law remedy. This is the rule of the famous "saving to suitors" clause, now embodied in 28 U.S.C. § 1333(1) (1976) (District courts have original and exclusive jurisdiction in all civil cases "of admiralty or maritime jurisdiction saving to suitors [petitioners] in all cases all other remedies to which they are otherwise entitled."). If a personal injury plaintiff exercises this right, he may bring his action in state court or in federal court, if he can make out independent grounds of federal jurisdiction. If in federal court, there is some doubt whether an action grounded in nonstatutory admiralty law gives rise to a seventh amendment jury right. Strong dicta exist to the effect that some kind of jury right exists. *Atlantic & Gulf Stevedore v. Ellerman Lines*, 369 U.S. 355, 359-60 (1962) ("[S]uit being [brought] in federal courts by reason of diversity of citizenship carri[ed] with it, of course, the right of trial by jury.").

In contrast limitation proceedings are exclusively within the jurisdiction of the admiralty court. 46 U.S.C. § 185 (1976). Even on the Great Lakes, where admiralty must provide a statutory jury trial, 28 U.S.C. § 1873 (1976), the courts do not allow juries in actions under the Limitation Act. *In re Great Lakes Towing Co.*, 395 F. Supp. 810, 812 (N.D. Ohio 1974).

<sup>147</sup> See *Hartford Accident & Indemn. Co. v. Southern Pac. Co.*, 273 U.S. 207, 216-17 (1927); Staring, *supra* note 40, at 1180.

look with disfavor on the *Rodco* variant, which unnecessarily destroys the jury rights of the limitation claimants.

In *Langnes v. Green*,<sup>148</sup> for example, only one claim existed against the vessel owner. His interest in a *concursum*, the Supreme Court said, was nonexistent, although his interest in limitation of liability continued.<sup>149</sup> The Supreme Court therefore allowed the plaintiff to sue outside admiralty, provided that the plaintiff refrain from litigating defendant's right to limit liability. Thus, the Court contemplated that the admiralty court would have continuing jurisdiction over the limitation proceeding. The admiralty court should first permit the plaintiff to obtain a judgment from a nonadmiralty court, where a jury right could be exercised. Next the plaintiff would bring the judgment to admiralty court where the limitation right of the vessel owner would be decided. The key element of the formula was that plaintiff achieve no *res judicata* advantage on any issue crucial to the defendant's right to limit liability.<sup>150</sup> On the other hand, the vessel owner was not to obtain *res judicata* advantages from the admiralty court (sitting without a jury) on his underlying liability.<sup>151</sup>

The Supreme Court went further in *Lake Tankers Corp. v. Henn*<sup>152</sup> to emphasize that the Limitation Act should be narrowly construed to preserve plaintiffs' rights to jury trials.<sup>153</sup> There, the plaintiff stipulated that her claim, in conjunction with other known claims, was so low that the value of vessel and freight was not exceeded. In order to preserve the vessel owner's right to have an admiralty court decide whether limitation of liability existed, the

<sup>148</sup> 282 U.S. 531 (1931).

<sup>149</sup> *Id.* at 540. See generally G. GILMORE & C. BLACK, *supra* note 1, § 10-19.

<sup>150</sup> Thus, when Green sought a ruling in his state court action that the vessel owner had knowledge and privity of the court, and hence no right to limit liability, the vessel owner obtained an injunction against further prosecution of the state action on the theory that only the admiralty court could decide the limitation issue. The admiralty court gave the option of avoiding the injunction by withdrawing the "knowledge and privity" issue from the state court action. *Ex parte Green*, 286 U.S. 437, 440 (1932).

<sup>151</sup> See *The "Benefactor" S.S. Co. v. Mount*, 103 U.S. 239, 243 (1880) (judgment outside the limitation proceeding *res judicata* within the proceeding); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 595-96 (2d Cir. 1961) (limitation proceedings establish *res judicata*); *Hanseatische Reederei Emil Offen & Co. v. Marine Terminals Corp.*, 1973 A.M.C. 1934, 1937-38 (N.D. Cal. 1973) (findings in a limitation proceeding *res judicata* in any new action); see also Staring, *supra* note 40, at 1159-62 (describing the *res judicata* effect in various situations under the Act).

<sup>152</sup> 354 U.S. 147 (1957).

<sup>153</sup> "For us to expand the jurisdictional provisions of the Act to prevent respondent from now proceeding in her state case would transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights . . ." *Id.* at 152.

plaintiff waived *res judicata* on any decision the state court might make on the subject.<sup>154</sup> The district court retained jurisdiction over the petition for limitation but vacated the injunction, which allowed the plaintiff to proceed to her jury trial.

The meaning of these cases<sup>155</sup> is that a procedure should not be adopted which so lightly destroys the jury rights and choice of forum<sup>156</sup> of plaintiffs, especially where the alternative—the condition precedent rule—abrogates the entire issue.<sup>157</sup> Since no advantage exists for delaying the moment of reckoning with regard to antecedent liens, the better rule is the condition precedent, which prevents the limitation proceeding altogether if a fundamental substantive requirement of the Act cannot be met. In this way, destruction of the limitation claimants' jury rights is minimized.

### C. Priority Problems Raised by Limitation Lien Status

A third problem with the *Rodco* procedure is that it does not require discharge of all antecedent liens, but only those antecedent liens that are superior to the limitation liens. The court assumes that the lien status of the limitation claimants should be assessed against the lien status of the nonlimitation claimants. If the limitation claimants' liens *all* have a priority higher than the nonlimitation liens,

<sup>154</sup> *Id.* at 149.

<sup>155</sup> For a concise discussion of the *Langnes* and *Henn* decisions, see *Hanseatische Reederei Emil Offen & Co. v. Marine Terminals Corp.*, 1973 A.M.C. 1934 (N.D. Cal. 1973).

<sup>156</sup> Preserving choice of forum to the tort victims is also of concern. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (the leading forum non conveniens case) ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."). In a limitation proceeding, the vessel owner chooses among a wide choice of fora, denying the tort claimants this right. See *FED. R. CIV. P. SUPP. F(9)* (venue in any district where the vessel owner has been sued or the vessel has been arrested, or, if these events have not occurred, in any district where the vessel happens to be, or if the vessel is not in any district—i.e., on a long trip or destroyed—venue is in any district). Supplemental Rule F(9) allows for transfer of venue to "any district" if it serves the convenience of the parties or witnesses.

Incidentally, choice of forum with regard to the antecedent claimants is not an issue. These claimants may sue in personam outside of the Limitation Act. To vindicate their in rem rights, the antecedent claimants would have to go where the boat is anyway. Since, under the *Rodco* proceeding, the vessel is in the custody of the court, it is perfectly consistent with in rem procedure or the antecedent claimants to bring their claims to the limitation court. The antecedent lienholders may also prevent surrender of the vessel in a limitation proceeding altogether if they can libel prior to surrender in a limitation proceeding. *In re Zebroid Trawling Corp.*, 428 F.2d 226 (1st Cir. 1970).

<sup>157</sup> *Cf. The Aquitania*, 20 F.2d 457 (2d Cir. 1927) (petitioner sought *concursum* even though the fund exceeded potential claims). The *Aquitania* court rejected the petition with this comment: "All that could be accomplished by [the vessel owner], if successful on this petition, would be to avoid jury trials. It would be permitting [the vessel owner] to try the case in another forum of its choice, and thus is unauthorized by the Act." *Id.* at 459.

discharge of the nonlimitation liens is *not* required. The court's rule therefore contemplates the survival of the liens in the limitation proceeding—if not inter se, then at least as against the antecedent liens.

The *Rodco* court ruled that only one of the liens which had theretofore appeared was immune from the Act. This antecedent lien—a ship mortgage—was not prior in right to any limitation lien.<sup>158</sup> Under the Ship Mortgage Act, tort claims and salvage claims are always given priority over mortgages.<sup>159</sup> The only limitation claimants who had so far appeared were three personal injury claimants and a salvage claim. Thus, according to the court's procedural guidelines, the vessel owner would not have to discharge the mortgage.

For the parties in the *Rodco* case, then, the court's treatment of "prior liens" does not create difficult doctrinal problems. Problems instantly arise, however, if we change the facts and assume that, for instance, there is a small supply claim in the limitation proceeding. In such a case, the salvage and personal injury claims in the limitation

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<sup>158</sup> After the *Good Boy* sank, it was salvaged. The salvor appeared in the limitation proceeding, claiming its lien was subsequent to the limitation voyage, so that its claim was immune from limitation of the vessel owner's liability. The Fifth Circuit, however, ruled that salvage claims at the end of the voyage were *always* limitation claims. 651 F.2d at 1105 (citing *Metropolitan Redwood Lumber Co. v. Doe*, 223 U.S. 365, 375-76 (1912)).

It should be readily apparent by now that nothing is simple when it regards the Limitation Act. While it is beyond the scope of this Article, I would suggest that the *Rodco* court misread the Supreme Court's opinion in *Metropolitan Redwood Lumber*. In that case, a salvor towed the injured vessel to port, suggesting that the voyage had not "ended" until arrival in port. Cf. *The H.F. Dimock*, 186 F. 662, 663 (S.D.N.Y. 1910) (value of vessel not reduced by salvage cost where collision did not end the voyage). If salvage had occurred *after* the voyage had ended, presumably the Supreme Court would not have ruled the salvor to be a limitation claimant. In contrast the scanty facts in *Rodco*, based solely upon the allegations in the vessel owner's petition, suggest that the voyage ended when the M/V *Good Boy* sank to the bottom of the Mississippi. In such case, the salvage claim may not be considered a limitation claimant. A rule that salvage is *always* a limitation claim (unless the salvor can show that salvage was pursuant to a "personal contract" with the vessel owner, 651 F.2d at 1105 n.7) is clearly wrong, as can be shown by reference to facts in *The City of Norwich*, 118 U.S. 468 (1886). In *Norwich*, the Court thought that when the voyage "ends" at the time of the collision, the vessel should be valued without regard to subsequent repairs or services. In that case, the vessel had been worth \$25,000 after salvage. Salvage, however, cost \$22,500. The Court therefore approved a valuation of \$2,500 for the vessel, representing salvaged value minus the cost of salvage. The Court justified the valuation on the grounds that the vessel owner's liability ought not to be increased because he undertook repairs on the vessel after the voyage had ended. See *supra* note 75. Let us suppose that the salvor in *Norwich* had an outstanding claim for salvage. The *Rodco* court would presumably require the salvor to seek reimbursement in the limitation proceeding. The vessel owner would therefore benefit from a decreased valuation of the vessel to \$2,500 (to reflect the cost of salvage). The salvor, meanwhile, would have to compete with other claimants for the \$2,500 fund. The result of salvage *always* coming within the Limitation Act is an unconscionable windfall for the vessel owner at the expense of the salvor.

<sup>159</sup> 46 U.S.C. § 953(a) (1976).



proceeding are senior to the mortgage<sup>160</sup> which is senior to the supply claim.<sup>161</sup> The supply claim, in turn, is entitled to share the limitation fund pro rata with the salvage and tort claims.<sup>162</sup>

Depending on what one believes is the status of liens held by limitation claimants, it might at first glance be thought that the court of appeals is setting up a circular priority system.<sup>163</sup> The classic circularity problem does not actually arise here, since the issue is not which of the claimants should be paid first, but whether "prior" liens must be discharged in order for the vessel owner to be exonerated from further liability on the remaining claims.

The logical possibilities are bicameral in nature: (A) discharge of antecedent liens is never required unless *all* limitation liens are inferior in right; or (B) discharge is required whenever a *single* limitation lien is inferior. Both of the logical possibilities are unsatisfactory. To demonstrate this, let us again assume that a minor supply claim is among the limitation claims in *Rodco*. The supply claim is inferior to the mortgage, but the mortgage is inferior to the other limitation claims. The supply claim is entitled to share pro rata with the other limitation claims (salvage and tort).

The first logical possibility is that the mortgage (superior to the supply claim but inferior to the salvage and personal injury claims) need not be discharged. If this is the rule, then the *Rodco* court is not doing what it purports to be doing—vindicating the lien status of the limitation claims. Under this rule, the mortgage is being subordinated to the supply claim, in violation of the statutory priority accorded to preferred ship mortgages. This follows because the mortgagee is being excluded from sharing in the proceeds from the sale of the vessel while the supply claim is not. Upon sale of the vessel, of course, the mortgage lien is destroyed, and an inferior lien is allowed at least partial compensation.

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<sup>160</sup> *Id.*

<sup>161</sup> 46 U.S.C. § 953(a) (1977) (Subsequent supply liens lose to previous mortgages. "First in time, first in right.").

<sup>162</sup> *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 122 (1871) (cargo claim and tort claim). This circularity problem actually would have been present in *In re Zebroid Trawling Corp.*, 428 F.2d 226 (1st Cir. 1970), if the vessel owner had been able to surrender the vessel to set up the limitation fund. There, the widow's tort claim would have been superior to a mortgage, which would have been superior to a supply lien. The supply lien was entitled to share pro rata with the tort lien. See *supra* note 119.

<sup>163</sup> See 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 39.1 (1965) ("What should be done when an inadequate fund is to be distributed among competing claimants and under applicable rules of law . . . B and C have claims entitled to equal priority, one of which is superior, the other inferior, to A's claim?"). Gilmore's treatment of circular priorities is must reading for those metaphysically hardy enough to pursue such a topic.



Under the second possibility, the mortgage must be discharged because of the tiny cargo claim hypothetically present among the limitation claims. This rule would create an unhealthy economic incentive for the vessel owner (or, of course, his insurer) to pay off the low priority cargo claim in full in order to avoid having to discharge the entire mortgage. If the cargo claimant accepts a settlement from the vessel owner, the mortgage lien, of course, is lost. And there is at least the theoretical possibility that the mortgagee would find it advantageous to arrange some sort of bribe to the cargo claimant to refuse the vessel owner's tender of payment, since, with the cargo claim present, the mortgagee is either entitled to discharge or is in a position to pursue his in rem rights against the vessel after the limitation proceeding falls apart.<sup>164</sup> The inducement of corruption was relied upon by Professor Gilmore in rejecting certain solutions to the circular priority problem.<sup>165</sup> It is therefore appropriate that we consider these matters here. But apart from any inducement to corruption, this second and more extreme corollary to the *Rodco* variant ought to be rejected because it reverses ancient maritime lien priorities in cases where it is cheaper to discharge the inferior limitation liens than it is to discharge the more expensive high priority antecedent liens.

The pseudo-circular priority problem is avoided, however, if we assume that the Limitation Act estops the enforcement of limitation liens, an assumption which comports with practical reality—denial of priorities inter se and the right to arrest the vessel.<sup>166</sup> Under such a doctrine, *all* antecedent liens—regardless of priority—must be discharged before limitation of liability is allowed.

Is a rule that the Limitation Act estops enforcement of limitation liens fair to all interested parties? Undoubtedly it is. The limitation

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<sup>164</sup> The chances that a mortgagee will find it profitable to bribe a cargo claimant to stay in the limitation proceeding are remote, but possible. Suppose that there are \$3,000,000 in personal injury claims, and two cargo claims, one for \$1,000,000 and one for \$100. Suppose further that there is an antecedent mortgagee who would like to protect his lien on the vessel, which is worth \$1,000,000. If the vessel owner pays off the cargo claims and contributes the vessel to the limitation fund, his out-of-pocket expense is \$2,000,100 for \$4,000,100 worth of claims. The mortgagee, whose lien need not be discharged, loses its lien, and if the vessel owner is insolvent, the mortgagee loses out altogether. But if the mortgagee bribes the \$100 claimant to stay in, the limitation proceeding falls apart, and the mortgagee may foreclose his lien against the vessel. Of course, the vessel is worth \$1,000,000 and the personal injury claims, worth \$3,000,000 have superior liens. But if, for some reason, the personal injury plaintiffs do not choose to pursue the vessel—i.e., there is a direct action against the liability insurer, where there is a right to a jury trial—then it might be advantageous for the mortgagee to resort to bribery of the \$100 cargo claimant.

<sup>165</sup> 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 39.2 (1965).

<sup>166</sup> See *supra* text accompanying notes 59-69.

claimants are not served by those liens in any way. The most these claimants can expect, unfortunately, is a proportionate share of the limitation fund. And if the limitation proceeding collapses (e.g., the vessel owner is found to have privity and knowledge during the ensuing litigation), the limitation liens would fully recover their previous status in any future in rem distribution.

The antecedent lienholders are hardly prejudiced. They are either paid off entirely or left free, upon the collapse of the limitation proceeding, to pursue the vessel with in rem process. Any effect on them is entirely beneficial. Neither is the vessel owner prejudiced. The vessel owner's liability to limitation claimants is the value of the vessel and earned freight whether or not the limitation claimants are secured or unsecured creditors. If he cannot do this much, because of outstanding nonlimitation liens, the vessel owner has little right to complain. After all, his obligation is to pay his debts or at least to provide security therefor when the debts are liquidated.

As a final matter on fairness of estoppel, it was admitted earlier that estoppel reverses maritime lien priorities.<sup>167</sup> I have also suggested that the two logical resolutions of the pseudo-circularity problem other than estoppel also tend to reverse lien priorities.<sup>168</sup> We therefore must choose between competing evils.

The estoppel solution should be chosen because it is the fairest of the options. In addition, if estoppel is the law, a court will never have to award a low priority lien status over a high priority lien. With the condition precedent rule in effect, the vessel owner must either pay off nonlimitation liens or must post adequate bond, keeping the vessel free for future arrest. If he can do neither, the limitation proceeding falls apart and all liens are preserved. Thus, estoppel, when combined with the condition precedent rule as to nonlimitation liens, does not affect lien priorities as much as might appear upon first impression, except to the extent that a vessel owner is encouraged to prefer an inferior lienholder whose claim arose before the limitation voyage. But this does not harm limitation claimants who in any case can look only to the limitation fund for compensation.

To conclude, it has been shown that estoppel of the limitation liens poses no harm to any interested party. It is therefore best to declare that the Limitation Act estops enforcement of liens of those claimants whose claims are limited by the Act. If estoppel is declared to be the law, the courts can avoid a vexing circularity problem.

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<sup>167</sup> See *supra* notes 61-63 and accompanying text.

<sup>168</sup> See *supra* note 163.

## VII. SUBSEQUENT AND CONCURRENT LIENS

In any case where the vessel has not been destroyed at the end of the limitation voyage, it is possible that subsequent liens not subject to the Limitation Act will arise. But in light of what has been said these liens do not pose any new doctrinal problems.

Subsequent liens should be treated in the same manner as antecedent liens. In other words, we should assume that enforcement of liens subject to the limitation proceeding is estopped. If the vessel owner wishes to stock the limitation fund by posting a bond in lieu of surrendering the vessel, then the amount posted should be equivalent to the value of the vessel and earned freight, plus any amounts due under the Loss of Life amendments. If the bond is posted, the subsequent lienholder—like his antecedent brethren—is unaffected. The vessel remains at large and is susceptible to arrest by the subsequent lienholder. Where the subsequent lienholder has already arrested the vessel, the vessel owner loses his option to surrender the vessel as a means of establishing the limitation fund. The *Zebroid* case is equally persuasive authority on this point for subsequent as well as for antecedent lienholders.

In surrender cases, the vessel owner should be required to discharge the subsequent liens or at least to post security to guarantee payment of them.<sup>169</sup> In the absence of discharge, subsequent liens are just as likely to exhaust the limitation fund as are antecedent liens. In support of equality of treatment for subsequent liens, we may note that Supplemental Rule F(2) requires all *outstanding* liens to be listed—regardless of whether they are prior or later in time than the limitation voyage.<sup>170</sup>

Similarly, it is possible that liens could arise *during* the limitation voyage but not be subject to the Limitation Act. Where the vessel

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<sup>169</sup> "[T]he owner must surrender the vessel or have it appraised free of all prior and all subsequent liens." *The Pelotas*, 21 F.2d 236, 239 (E.D. La. 1927).

<sup>170</sup> FED. R. CIV. P. SUPP. F(2). Rule F(2) does not require *all* antecedent liens to be listed, but only "prior paramount liens." This could be taken to mean that certain antecedent liens are *not* paramount, and hence they need not be listed in the complaint, or, by implication, discharged as a condition precedent to limitation. In fact, this implication may have been made by the *Rodco* court. My response is that such far-ranging implications need not be drawn from the use of the stray word "paramount." The word could mean "still outstanding." The word "paramount" is not used with regard to subsequent liens, i.e., a subsequent supply lien where all the limitation claims are in tort. Therefore, we need not assume that the Supreme Court, in promulgating Rule F(2), was making a statement on the scope of the condition precedent rule. It may be further noted that the *Rodco* court itself discounted the meaning of Rule F(2) with regard to the condition precedent rule, noting that the requirement of listing the liens was not the same as requiring that they be discharged. 661 F.2d at 1104. Similar reasoning precludes that we make too much of the word "paramount."

owner comes under the Loss of Life amendments, he may not limit his liability where the master of the vessel was personally negligent at the beginning of the voyage. In these narrow circumstances, the vessel owner will be unable to limit liability against personal injury and wrongful death claimants even if he personally is without knowledge or privity,<sup>171</sup> but may remain able to limit his liability against property claimants. Hence, there can be a personal injury lien which is not subject to an ongoing limitation proceeding against noninjury claimants.<sup>172</sup> Also, wage liens<sup>173</sup> and any lien arising from a "personal contract" of the vessel owner<sup>174</sup> cannot be subject to the Limitation Act. Charter parties, for example, have been held to be personal contracts and therefore immune from the Act.<sup>175</sup> Under these circumstances, liens arising during the limitation voyage cannot be made subject to the Act and hence holders of such liens retain their right to foreclose. Like the subsequent liens, these concurrent liens should be discharged as a condition precedent to the limitation proceedings.<sup>176</sup>

Finally, it may happen that a vessel is encumbered by an outstanding lien not subject to the Limitation Act as to which the vessel owner has no personal liability. For instance, the vessel may have been purchased just before the limitation voyage. Prior to the purchase, a collision may have occurred. The new vessel owner would not be liable in personam for that collision, but the vessel remains encumbered by a tort lien.<sup>177</sup> In such a case, the vessel owner should be

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<sup>171</sup> 46 U.S.C. § 183(e) (1976).

<sup>172</sup> E.g., *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 596-97 (2d Cir. 1961), cert. denied, 362 U.S. 991 (1962); *Moore-McCormack Lines, Inc. v. Armco Steel Corp.*, 272 F.2d 873, 876 (2d Cir. 1959).

<sup>173</sup> 46 U.S.C. § 189 (1976); *In re Oswego Barge Corp.*, 439 F. Supp. 312, 318 (N.D.N.Y. 1977), *aff'd in part, rev'd in part*, 664 F.2d 327 (2d Cir. 1981).

<sup>174</sup> *Crowe*, *supra* note 20, at 1094.

<sup>175</sup> G. GILMORE & C. BLACK, *supra* note 1, § 10-26, at 899-900.

<sup>176</sup> Gilmore and Black wonder whether the exempted concurrent lienholders in the Moore-McCormack limitation proceeding, *supra* note 172, might somehow be able to intervene and thereby reduce the size of the limitation fund. G. GILMORE & C. BLACK, *supra* note 1, § 10-40, at 932. Of course, such plaintiffs would intervene only where the vessel owner has no other assets whatsoever.

Gilmore and Black have forgotten their own condition precedent rule. If the personal injury plaintiffs have lien status, their liens must be discharged as a condition precedent to the limitation proceeding. Gilmore and Black are on point only to the extent that the plaintiffs have no other claim except an unsecured Jones Act claim, a very unlikely event. See *supra* note 56. In the very narrow case where a Jones Act claimant is excluded from the limitation fund by the knowledge and privity of the captain, the Jones Act plaintiff would seem to be out of luck. The limitation claimants have the right to challenge the Jones Act claimant's right to share in the fund. See FED. R. CIV. P. SUPP. F(8).

<sup>177</sup> See *The John G. Stevens*, 170 U.S. 113, 120-21 (1898) (maritime liens survive a private sale).

required to discharge the lien as a condition precedent to a limitation proceeding, even though he has no obligation in law to pay the charterer's torts.<sup>178</sup> The fundamental policy behind the condition precedent rule is to preserve the full unencumbered value of the vessel to the limitation claimants. When the vessel is surrendered subject to the type of collision lien described above, the lien threatens to reduce the limitation fund. Such a reduction should not be allowed, even if it means that the vessel owner must forego surrender and post the bond. The vessel owner's overriding obligation to the limitation claimants is to contribute the full value of the vessel to the limitation fund. No antecedent, concurrent or subsequent maritime lien should be permitted to allow the vessel owner to escape from this responsibility.

#### VIII. THE LIMITATION PROCEEDING AS AN IN REM AND IN PERSONAM ACTION

A question curiously left unanswered by Congress is whether a court to which a vessel has been surrendered can sell the vessel in an in rem sale, as opposed to an ordinary marshal's sale. The answer to this question is important.

In an in rem sale, notice of the sale is given to the world.<sup>179</sup> The sale is therefore good against all claimants. The vessel is conveyed to the purchaser free of all claims and encumbrances.<sup>180</sup> Any claimants with liens on the vessel must intervene and claim against the fund, not against the vessel.<sup>181</sup> Naturally, a sale of this sort brings a higher price than an ordinary judicial sale, since the vessel can be offered with clear title.

A sale pursuant to attachment or execution on a judgment is entirely different. Notice is given only to the defendants joined in the action.<sup>182</sup> When the vessel is subsequently sold, the marshal sells only the defendant's interest.<sup>183</sup> Having been given no notice, the sale cannot affect the interests of persons who are not made parties to the litigation. Therefore, maritime liens survive the ordinary judicial sale.<sup>184</sup> The price at such a sale is bound to be drastically lower, because the vessel is conveyed subject to encumbrances.

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<sup>178</sup> G. GILMORE & C. BLACK, *supra* note 1, § 4-23, at 242.

<sup>179</sup> FED. R. CIV. P. SUPP. C(4).

<sup>180</sup> See generally Rogers, *Enforcement of Maritime Liens and Mortgages*, 47 TUL. L. REV. 767 (1973).

<sup>181</sup> *Id.* at 778-79.

<sup>182</sup> FED. R. CIV. P. SUPP. B(2).

<sup>183</sup> See *The Morning Star*, 5 F. Supp. 502, 503 (E.D.N.Y. 1933).

<sup>184</sup> Harmon, *Discharge and Waiver of Maritime Liens*, 47 TUL. L. REV. 786, 787 (1973).

What kind of sale can be conducted in a limitation proceeding—in rem or ordinary judicial sale? If only the ordinary judicial sale is contemplated, then the Limitation Act truly has no effect upon non-limitation lienholders who could pursue the vessel following the judicial sale. The sale would simply affect the vessel owner's interest, and no more. But the price the vessel would bring would equate with the *encumbered* value of the vessel. In such a case, the limitation claimants are greatly prejudiced, because the limitation fund, which may be established by surrender of the vessel, will be founded upon the encumbered value of the vessel.

It therefore makes much more sense to declare that the sale of the vessel in a surrender case should be pursuant to the court's in rem powers. Such a power certainly exists as a jurisdictional matter by virtue of the court's possession of the vessel.<sup>185</sup> If this power is utilized, surrender of the vessel succeeds in securing for the limitation claimants the full limitation fund contemplated by the Act. Antecedent and other nonlimitation lienholders would be given the notice to which they are entitled and would be forced to claim against the limitation fund. Of course, because of the condition precedent rule in surrender cases, these liens must be discharged as soon as they appear. Otherwise, the right of the vessel owner to limit liability in the limitation proceeding is lost. Therefore, two birds are dispatched with a single stone. Unknown lienholders not subject to the Act are flushed out and forced to present themselves (to the detriment of the vessel owner's right to a limitation proceeding, if he cannot pay off these lienholders or post a bond to protect the limitation claimants), and the limitation claimants are guaranteed that the fund established by the sale of the vessel will be based upon the unencumbered value of the vessel. No unfairness to the nonlimitation lienholders exists either. It is true that they are being flushed out, when otherwise they could rest upon their rights, but these lienholders must always step forward whenever any in rem action is commenced. Inconvenience caused to them is not different in kind from that caused whenever the vessel is arrested by another lienholder.

The Federal Rules are ambiguous but not unfavorable to an in rem sale in a limitation proceeding. The governing rule on actions in rem states that such a procedure is available "[w]henever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto."<sup>186</sup> Limitation proceedings are sufficiently

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<sup>185</sup> *Hartford Accident & Indem. Co. v. Southern Pac. Co.*, 273 U.S. 207, 217-18 (1927).

<sup>186</sup> FED. R. CIV. P. SUPP. C(1)(b).



"analogous" to the typical *in rem* proceeding to qualify. Notice to the world is always required for a limitation proceeding, as it is for an *in rem* proceeding.<sup>187</sup> No reason exists, therefore, to prevent an admiralty court from conducting an *in rem* sale. Admiralty courts have this unique power over vessels all to themselves. Since it does some good in a limitation proceeding, and no illegitimate harm is done to any interested party, the power should be used.<sup>188</sup>

Even if it is agreed that the limitation court may conduct an *in rem* sale, it is nevertheless beyond doubt that a limitation proceeding is based upon *in personam* jurisdiction over the vessel owner. The Supreme Court has stated the limitation proceeding to be a hybrid in *personam* and *in rem* action. According to the Court in *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*,<sup>189</sup> "[t]he cases show that the court may enter judgment *in personam* against the owner as well as judgment *in rem* against the *res* or the substituted fund . . . ." <sup>190</sup> Thus, if the vessel owner is ultimately denied the right to limit liability, he may find in *personam* judgments filed against him. But more important to us at this point is the Supreme Court's statement that the limitation proceeding is based partly on the court's *in rem* jurisdiction.<sup>191</sup> As long as this kind of jurisdiction is being

<sup>187</sup> *Id.* F(4).

<sup>188</sup> See 273 U.S. at 215-16 ("[T]his Court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it . . .").

Judge Benedict's remarks in *The Mendota*, 14 F. 358, 364 (S.D.N.Y. 1882), about the court's power of sale in a limitation proceeding, are broad enough to suggest that an *in rem* sale should be chosen for its practical benefits:

It has been said that the statute confers no power upon this court to direct such a sale [of a vessel previously attached by a state sheriff], nor does it, in express terms. But such power is to be implied, because necessary to the exercise of powers that are expressed. The supreme court of the United States, sitting in admiralty, found in the statute power to restrain the further proceeding of suits against the ship-owner, and the power to stay such proceedings must include the power to save from destruction property which otherwise the stay will destroy. The power to sell the ship rests upon the same ground as the power to protect the owner from suits, namely, the necessity of the case.

It is significant that the treatise which bears Judge Benedict's name assumes that a limitation court should conduct an *in rem* sale, citing *The Mendota* as authority for the proposition. See 3 E. BENEDICT, *THE AMERICAN ADMIRALTY* 458 (6th ed. 1940); cf. G. GILMORE & C. BLACK, *supra* note 1, at 816 (bankruptcy court can adjudicate maritime liens, and "it can hardly be doubted that it has . . . power to sell a ship free of liens . . ."). The Bankruptcy Reform Act has amended Title 28 to make clear that bankruptcy courts do have admiralty powers. 28 U.S.C.A. § 1481 (West Supp. 1981) (effective 1984).

<sup>189</sup> 273 U.S. 207 (1927).

<sup>190</sup> *Id.* at 215 (citation omitted).

<sup>191</sup> "The jurisdiction of the admiralty court attaches in *rem* and in *personam* by reason of the custody of the *res* put by the petitioner into its hands." *Id.* at 217.

exercised, there is no reason why in rem sales cannot be used to establish the limitation fund.

### CONCLUSION

There are two key elements in sorting out the relationship between maritime liens and claims under the Limitation Act. First, in surrender cases, courts should assert the condition precedent rule as to liens not subject to the Act, requiring that such liens be discharged or that sufficient sums be paid to the court to guarantee discharge. The *Rodco* decision stands in the way of the condition precedent, however, and we can only hope that the case is not followed.

The condition precedent is useful only for the surrender cases. In the bond-posting cases, the rule is well established that the amount of the bond or the amount of money paid into the court must equate with the unencumbered value of the vessel, plus freight and other amounts which may be required. Since our chief concern is that the full amount of the limitation fund be reserved for the limitation claimants, safe from reduction because of nonlimitation liens, we need not extend the condition precedent rule to bond-posting cases. This point was recognized by the First Circuit in *Zebroid*. Gilmore and Black go farther and argue that the condition precedent should be applied to the bond-posting cases, and they do so because they are out to deny vessel owners any limitation of liability where insolvency of the owner may be present. I have suggested, however, that application of the rule to bond-posting cases will not succeed in preventing insolvent vessel owners from limiting liability because insurance companies will intercede to discharge outstanding liens where it is profitable to do so.

The second important point which should be recognized is that the Limitation Act stops enforcement of the liens subject to a petition for limitation of liability. Estoppel of the liens comports with reality: limitation claimants may not arrest the vessel and have no priority inter se. Nor can they compete outside the limitation proceeding against nonlimitation liens, since the *concurso* confines them to the limitation proceeding. Estoppel of limitation liens is also fair to all interested parties.

No court has held that the Limitation Act estops enforcement of the liens of limitation claimants, and the Fifth Circuit in *Rodco* has held to the contrary. Again, we can only hope that the *Rodco* decision is not followed, for, as I have shown, it raises pseudo-circularity problems of considerable metaphysical difficulty. These problems can be totally avoided, however, if estoppel of limitation liens is the rule. It is for this reason that a doctrine of estoppel is a good idea.